Judge and Jurisconsult- Coercive and Persuasive Authority in Islamic Law

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Zusammenfassung/ summary

Judge and Jurisconsult – Coercive and Persuasive Authority in Islamic Law

(Richter und Rechtsberater- Zwingende und überzeugende Autorität im Islamischen Recht)

Wer spricht das Recht in der islamischen Rechtsprechung? Die islamische Rechtsgeschichte konzentrierte sich lange auf den Einzelrichter (*qāḍī*) als Inbegriff der Rechtsprechung. Der Richter handelte jedoch nicht als einzige Verkörperung der Rechtsprechung. Ein Justizpersonal unterstützte seine und arbeitete von einer ihm unterstellten Position aus. Darüber hinaus hat der gelehrte Rechtsberater (*muftī*) die Rechtsprechung durch übereinstimmende und abweichende Meinungen vor Gericht in vielerlei Hinsicht geprägt. Die Arbeit konzentriert sich auf zwei Autoritäten am Gericht – *qāḍī* und *muftī* – in der frühen ʿAbbāsidischen Rechtsgeschichte (2. und 3. Jahrhundert nach der islamischen Zeitrechnung bzw. 8. und 9. Jahrhundert der gregorianischen Zeit), die miteinander kooperiert oder auch konkurriert haben. Die Grundlage ihrer Beziehung ist das islamische Prinzip der gerichtlichen Beratung von Experten in Rechtsfragen. Die islamische Rechtslehre ermutigt einen Richter, der mit Rechtsunsicherheiten konfrontiert war, einen gelehrten Rechtsberater (*muftī*) zu konsultieren, bevor er eine gerichtliche Entscheidung trifft. Die islamische Rechtsprechung entstand somit aus einem Verhältnis von Kooperation, Konfrontation und Kooptation zwischen Richtern und (außer-gerichtlichen) gelehrten Rechtsberatern.

Judge and Jurisconsult – Coercive and Persuasive Authority in Islamic Law

Who dispenses justice at court? Islamic legal historians have long focused on the single judge (*qāḍī)* as the embodiment of the administration of justice. The judge, however, did not act alone in dispensing justice. A judicial staff supported his work, working from a position subordinate to him. In addition, evading a clearly demarcated judicial hierarchy, the learned jurisconsult (*muftī*) shaped adjudication in many distinct ways through concurring and dissenting opinions at court. This contribution focuses on two authorities—the *qāḍī* and the *muftī*—who cooperated or competed with each other at court in early ʿAbbāsid legal history (2nd-3rd century A. H. / 8th-9th century C.E.) Fundamental to their relationship is the Islamic principle of judicial consultation of experts on legal questions. Islamic legal doctrine encouraged a judge confronted with legal uncertainties to consult a *muftī* before issuing a judicial decision. Authorities – the *qāḍī* and the *muftī*— who cooperated or competed with each other at court. Islamic adjudication thus emerged out of cooperation, confrontation and cooptation with (extra-judicial) legal experts.

Judge And Jurisconsult - Coercive and Persuasive Authority in Islamic Law

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Chapter One. Introduction

I. Introduction

In this study the authority of legal personae is central. The aim of this work is to study Islamic legal authorities as part of the Islamic legal system, and thereby to make a contribution of Islamic legal authorities to the theory, sociology and philosophy of legal authority. The purpose is to contribute to the understanding of authority in law by studying it in the process of its creation. This work can be understood as an intervention into the understandings of authorities in law, particularly those contributing to Islamic judicial law-making. It is a retelling and unsettling of a settled historical narrative and aims at recovering possibilities of explaining authorities of law-making that have been overlooked. Most importantly, re-constructing the set of conceptions about authority and representation through legal personae in legal history might put contemporary thought about constructing the legal sovereign in perspective. The aim of this study is to develop self-understood notions of innate legal authority and legitimacy as understood and produced by legal personae in Islamic legal discourse and legal history. Employing a critical legal studies approach, this work attempts to contribute to an understanding of legal domination through reconstructing legal history.

1. Debating and Creating Legal Authority of Judge and Jurisconsult

One of the first legal scholars, Khaṣṣāf, described a third/ninth century[1] courtroom setting in the mosque during the formative Islamic period and affirmed the presence of jurists on the judge's bench to advise the judge in complicated cases:

On his arrival in the mosque the *qāḍī* would salute the audience, offer two or four units of prayer [*rak'as*], and ask God to grant him success and guide him towards the right path, so as to enable him to uphold the truth and save him from transgression. After that, he would sit facing the Kaʿba [in Mecca]. Court chamberlains would stand in front of him, at such a distance that they might hear the *qāḍī's* conversation with the litigants.

[1] Time periods will be indicated both according to the Islamic calendar, abbreviated as A.H., After Hijra, the emigration of the Prophet from Mecca to Medina in 622, with which the Islamic calendar starts, and the Gregorian (Western or Christian) calendar, conventionally abbreviated as C.E., Common Era, starting with the birth of Jesus Christ. The latter is to indicate the widely known time-line, the first is to assess the events within Muslim historicity.

The *qāḍī* placed his portable archive entailing the court files on his right-hand side. The clerk sat near him, at such a distance that the *qāḍī* could watch his performance, while the deputy judge stood in front of him and called the litigants in turn. The guard would stand near to him. The *qāḍī* allowed the jurists […] to be seated near him, so that it would be easier for him to consult them on complicated legal issues. The two litigants would sit side by side in front of them. [2]

The two legal personae – judge and the consulting jurists – mostly existed side by side, and would collaborate on adjudicative cases when needed. Because the judge and the jurisconsults (*muftī*)[3] were specialists of one and the same law, and because there were no formalized lines of authority, the question of authority is crucial. Authority is intriguing and pertinent when both figures appear in adjudication. Most notably, Islamic legal doctrine encouraged a judge who was confronted with particular legal uncertainties to consult with a *muftī*-scholar before issuing a judicial decision, who could, at times, even sit on a *consilium*.[4] Both had the authority to interpret Islamic law, although only the judge could pass binding judgments, while the jurist, in his function as a jurisconsult (*muftī)*, could only give advice in the form of a legal opinion (*fatwā)* or a judicial consultation (*mushāwara).* The Qur'ānic verse 3: 159 where the Prophet himself is urged to "[c]onsult them in the matter; and when you have decided, place your trust in God", became the basis for the jurisconsults' authority in the Islamic judicial system. Interpretations of this verse also emerged central in how the idea of a "consultative justice" (*Konsultativjustiz*)[5] developed through Islamic judicial history.

In a critical stance towards the concept of a "consultative justice", scholar of Islamic law *H. Krüger* calls judicial consultation from today's perspective "ein Unding" [6] (an impossibility), referring to the principles of *iura novit curia* (the court knows the law)[7] and *da mihi factum*, *dabo tibi ius* (give me the facts, I will give you the law), presupposing that the judge reaching out to the jurisconsult does so because he does not

[2] Khaṣṣāf, *Adab al-qāḍī*, sec. 80, pp. 85-86. For a further discussion of this quote, see Chapter Four, I.3.c.
[3] *Muftī* and its translation from Arabic to English as jurisconsult are both used interchangeably in this work.
[4] Tyan, *Histoire de l'organisation judiciare* (1960), p. 222. The consilium is an instrument that developed to its fullest in courts in Muslim Spain, outside of the Abbasid Empire.
[5] Becker, *Islamstudien* (1932), II, p. 313 who spoke of the fatwa giving practice of the *muftīs* in general.
[6] Krüger, "Grundprobleme des islamischen Fetwa-Wesens" (2003), p. 26.
[7] On the foundations of the *iura novit curia* rule in pre-modern and modern (European) legal history, see Oestmann, "Grenzen der richterlichen Rechtserkenntnis" (2004), pp. 305-31; pp. 311-344.

know the law, and that the adjudicative application of the law is the exclusive task and obligation of the judge – and that the principle of judicial consultation – with an extrajudicial authority – infringes upon these two maxims.

However, the phenomenon of "consultative justice" is not as singular to Islamic law as *Krüger* might suggest. Legal histories tell many alike examples of courts reaching out to an extrajudicial site of legal expertise: Jewish, Roman, Italian, and German legal history, the latter even up until 1870.[8] In Germany, the procedure was called the *Aktenversendung*, and from the 16th to the 19th century, German courts were obliged to submit to the (out-of-court) law faculty of a university, for final decision the record of any case in which the principle by which it should be decided was in doubt.[9] For legal historian *H. Berman*, the *Aktenversendung* was a particularly striking example of the professorial character of German law.[10] I would argue that all these examples of extrajudicial law-making showed how scholars ensured to have a say in adjudication.

Even with respect to today's court practice, empirical political scientist *U. Kranenpohl* is less categorical than *Krüger* and instead documents judicial consultation of the German Federal Constitutional Court as a practice of "balanced critical deliberation" [11]. Consultation is illustrated as an exchange of arguments of equal judges, albeit, and importantly different from the Islamic examples of the single-judge, with judicial colleagues *on the bench*. In these cases, consultations are exercised within collegial organs, allowing for a development of a judgment that was collectively arrived at.[12]

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[8] References to consultative practices of courts will be made throughout the study. To mention here only a few: Berger, Rabbinic Authority (1998); Tuori, "The ius respondendi and the Freedom of Roman Jurisprudence", (2004), pp. 295-337; Kunkel, "Das Wesen des ius respondendi",(1948), pp. 423-457; Magdelain," Ius respondendi" (1950) pp. 1-22; Kirshner, "*Consilia* as Authority in Late Medieval Italy" (1999), pp.107-40; Falk, *Consilia. Studien zur Praxis der Rechtsgutachten* (2006); Buchda,"Aktenversendung", *Handwörterbuch zur deutschen Rechtsgeschichte* (HRG) I, 1964, pp. 84-87; Schumann, "Beiträge studierter Juristen und anderer Rechtsexperten" (2007), pp. 443–461.

[9] Buchda,"Aktenversendung", Handwörterbuch zur deutschen Rechtsgeschichte (HRG) I, (1964), pp. 84-87; Berman, "Religious Dimensions of the Western Legal Tradition" (1999), p. 288.

[10] Berman, "Religious Dimensions of the Western Legal Tradition" (1999), p. 288.

[11] On judicial consultation as a forum of "balanced critical deliberation "at the German Federal Constitutional Court, see Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnis* (2010), pp.162-198.

[12] Collective consultation (or *Kollegialitätsprinzip*) has historically emerged as part of the shift from single- judge-courts to judicial benches, especially with regard to criminal law. For Germany see the debate on single judge/bench in the *Reichsjustizgesetze,* in Küper, *Die Richteridee der Strafprozessordnung und ihre geschichtlichen Grundlagen* (1967), pp. 305-312. The history of judical benches in the USA also was related to criminal offenses and started in the seventeenth century, see Towne, "The Historical Origins of Bench Trial for Serious Crime" (1982). For a critical debate of the Kollegialitätsprinzip as a way to control judicial arbitrariness, Ogorek, *Richterrecht oder Subsumtionsautomat* ? (1986), pp.153, 333-334. On advantages and disadvantages of single judge/bench, see Schmitt, *Gesetz und Urteil (1969)*, pp. 72-75; Le Bars, "Juge unique/Collégialité" (2004), p. 683; with

The central question of this book is it therefore to scrutinize the normative and empirical arrangements of authority as become visible in the Islamic principle of judicial consultation (*mushāwara*): that the (single) judge is advised to solicit an (one or many) jurisconsults as extradjudicial authority for solving a court case.

The structure of authority and legitimacy in Islamic legal history makes it crucial for us to explore the conceptualization of legal authorities, that is, the way in which particular legal personae and classes explain and justify their activity, authority, legitimacy, and ultimately power to themselves and to others. Indeed, a look at the legal literature of early Islam shows that any answer has to be nuanced, as authority is relational, contingent, and situational. While authority rests on certain qualifications, acquired or ascribed, it is the willingness of others to credit any given person, group or institution with legal authority that ultimately renders it effective. Like any kind of authority, legal authority does not denote a fixed attribute, but is premised on recognition and acquiescence.[13] As we will see, judge and jurisconsult, prominent parts of a legal system, were at the same time acutely aware of their political and societal roles and ambitions for influence.

Seeking and giving legal counsel is one way to explain a relationship of authority, and legal authorities in the making: who gives whom a legal opinion, and resulting in what legal change? This work addresses the relationship between judge and jurisconsult as one of competing authorities, as vested in legal personae. It aims at understanding the authority of the law when legal authorities produce competing, conflicting or complementary legal rules and results, and how they thus contribute to a legal order in the making. In the context of this study, the two competing authorities are, of course, quite different: the judge having binding, sanctioning, and enforceable authority,[14] while the *muftī*, an independent legal scholar and legal advisor who is consulted by individuals or officials of the state on points of Islamic law, has, at least at first glance, nothing but the authority of the argument. The *muftī's* arguments were not backed up by a compulsory enforcement mechanism, and needed to rely on the soundness and

reference to past and present judicial decision-making also today Jung, *Richterbilder* (2006) p. 90. See also Chapter Two, V. 2., on when the single judge shall solicit the jurisconsult.

[13] See also on religious authority, Krämer/Schmidtke, *Speaking for Islam* (2007), p. 2.

[14] For a recent introduction to the office of *qāḍī*, see, for example, Vikør, *Between God and the Sultan* (2005), pp. 168-84.

persuasion of the argument to be adopted. However, this authority is no less weighty: Muslim legal discussions located authority in epistemology, i.e. the exploration of how to derive a legal norm from the materials of the Islamic revelation. Authority and epistemological ability to dissect text was therefore intimately intertwined. Was epistemological competence and authority the only reason a judge would request, maybe adopt the ruling of a non-binding *fatwā* issued by an extrajudicial, non-state official, the *muftī*? The judge of course also applied sound legal reasoning to the interpretation of legal norms. But his authority, i.e. the exclusive authority of judges as men[15], was also derived from his appointment by the caliph as a state official, and thereby politically institutionalized. How did his authority transform when it encountered the authority of the *muftī* who acted as a private scholar without any official powers and employed his means to express his persuasive authority?

In later periods, especially under the Ottomans, this relationship between judge and jurist would become formalized.[16] But in the early, formative period of Islamic law, how did these two legal personae interact in situations of legal uncertainty? In which situations, over which problems did legal consultation occur; whose authority did consultation enlarge or confine? More specifically, how was their authority acquired and defended, debated and created? Who had the authority to speak law in moments of uncertainty: to decide, oppose or challenge understandings of law when legal text and legal reasoning do not produce closure by text? How did the "extrajudicial authority" of the *muftī* affect Islamic adjudication? Did the *muftī* act as a guide or constraint to the judge? How did the judge deal with this advice, solicited or unsolicited, before or during litigation? How does human agency in "finding", "applying" or "making" the law play out between legal authorities? Who had the final say in what Islamic adjudication and Islamic law was, and to a certain degree still is?

[15] Perhaps the only, and most likely the first, female judge in early Muslim legal history known is Thuml al-Qahramāna (d. 941), see in detail El-Cheikh, "The Qahramana in the Abbasid Court" (2003), p. 53. The cases studied of encounter between *qāḍīs* and *muftīs* included men only so that the exclusive use of the male form is in order here. Also, in the legal elaborations of jurists, the exclusive male form is used. The Ḥanafī school of law is the only one that discussed the gender issue of men and women regarding the position of muftīs, granting the function of issuing legal opinions also to women; on the position of *qāḍīs*, all schools agreed that to be male was a prerequisite. Thuml al-Qahramāna was therefore a noteworthy exception on many levels. See Chapter Two, V. on the prerequisites of the position of *qāḍī* and *muftī*.

[16] Under Ottoman rule (15th-20th century C.E.) while some jurisconsults remained private scholars, the Ottomans introduced the position of state *muftī (Shaykh al-Islam)*, a state employed official who officially watched over the judiciary and adjudication and whose *fatwās* had law-like effect on adjudication. Imber, *Ebu's Su'ud, The Islamic Legal Tradition* (1997); Jennings, *The Judicial Registers (Şer'i Mahkeme Sicilleri) of Kayseri (1590-1630) as a Source for Ottoman History*, Diss, UCLA (1972).

It needs to be underlined that this work is about explaining legal phenomena that was rarely documented. This was because judicial consultation was either a daily activity of the judge[17] , barely worth taking note of, or it was part of the non-quotidian, the exceptional, the rare constellation of a judge asking a jurisconsult for a legal opinion. These encounters were no less crucial, whether as a routine engagement of any judge or a rare exception. From time to time, early Muslim jurists intensely reflected on judicial consultation as part of adjudication, and these cases were documented. Not surprisingly, the relationship of authority between judge and jurisconsult in Islamic law took a variety of forms in a variety of situations. It ranged from the cooperative and complementary to the competitive and confrontational.

The question of authority becomes particularly captivating when it is embedded into a religio-legal system. The effect of religion on legal authority will therefore run as a theme throughout the entire study. Islamic law is law as much as religion, and is therefore also part of a system of religious duties. Significantly, though, the legal subject-matter and its legal relations were not completely assimilated to a religious order.[18] "There exists a clear distinction between the purely religious sphere and the sphere of law proper, and we are justified in using the term of Islamic law […]."[19] It is one of the challenges of this study to show that law and religion were not separated, yet in many ways differentiated. [20] In this sense, this study shows that authority does not emanate from text alone, even if the text is considered divine. Rather, authority crystallizes where there is no text. When no text is brought in to win the argumentative debate, authority becomes decisive either through the argument of legal methodology (in how to deal with the absence of text) or the ascribed or real qualities linked to legal figures. Legal

[17] On the daily activity of judges interpreting and thus to engaging in daily judicial law-making, rather than the occasional filling in of gaps, see for example the study on the German Federal Constitutional Court, Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (2010), Eckertz-Höfer, "Vom guten Richter" (2009), p. 733, Esser, *Vorverständnis und Methodenwahl* (1970).
[18] Schacht, *An Introduction to Islamic Law* (1964), p. 201.
[19] Ibid.
[20] Johansen, "Genres of Legal Literature", *Oxford International Encyclopedia of Legal History* (2009), III, p. 321. One of the most distinguished attempts to differentiate between legal and non-legal concerns in Islamic law has been offered by Johansen, *Contingency in a Sacred Law* (1998). Though according to systems theory, law strives to gain and retain its autonomy to function independently of other social institutions and systems such as religion, polity and economy, it remains historically and functionally linked to these other institutions. See Luhmann, *Ausdifferenzierung des Rechts* (1981), p. 173.

authorities are shaped by the way they act vis-à-vis the lacunae in the text and vis-à-vis each other.

2. Authority as an Analytic Concept

Explaining the notion of authority is in and of itself a challenging task.[21] In law, there are (at least) two notions of authority that are foundational: the *authority of law*, in the sense of law claiming our allegiance and obedience[22] as well as the *authorities in law*, legal personae that contribute to shape the law and our understanding of it. This work focuses on the latter, the *authorities in law*. Yet, there is a correlation between the two types of authority, especially in the formative period in which there is a particular, constitutive dynamic of the law evolving in parallel to the personae involved.

The authority of a person, group or even institution is centrally based on ascribed superiority by others.[23] There are many qualities that can contribute to authority: intelligence, knowledge, physical power, imposing presence, eloquence, legitimacy of different sorts**,** such as charisma or to be considered the embodiment of the state, religion or tradition. Recognizing this authority is based on the qualities of the individual wielder of authority, the educational background, skills and a decisive character.[24] These qualities cannot be reduced to one common denominator. Neither can they in their singularity or in their comprehensiveness necessarily affect authority. Authority can be ascribed to a person (explored in Chapter Two) or the position s/he holds (focus in Chapter Four). When authority is linked to a position (such as office or rank), institution or organization, authority is qualified as positional, or abstract, formal or secondary authority. Both types of personal and positional authority can appear combined with each other.[25]

The specificity of authority is brought about by other persons changing their behaviour based on their recognition of superiority[26], affecting change. Thus, authority typically comprises asymmetrical social relations.[27] It is asymmetrical when the behaviour of the

[21] Raz speaks of authority as one of the most controversial concepts of legal philosophy, Raz, *The Authority of Law* (2009), p. 2.
[22] Raz, *The Authority of Law* (2009), p. v.
[23] Eschenburg, *Über Autorität* (1976) p. 23; Rabe, "Autorität" (1992), p. 384 referring to the changing preconditions for senators and magistrates in the Roman Republic; Bahrdt, *Schlüsselbegriffe der Soziologie* (2003), pp. 161-169.
[24] Rabe, "Autorität" (1992), p. 383, with reference to the authority of the members of the Roman Senate.
[25] Gukenbiehl, "Autorität" (2001), p. 29.
[26] Bahrdt, *Schlüsselbegriffe der Soziologie* (2003) p. 169.
[27] Bahrdt, *Schlüsselbegriffe der Soziologie* (2003), p.161- 162.

other can be determined according one's own wish, causing the other to behave in a way s/he would not otherwise. The will of the other does not have to be broken continuously, every time. But the possibility of breaking the other's will casts a shadow on the entire relationship.[28] Accordingly, it will become of importance to track the change effected by the jurisconsult with, without or against the will of a judge. This is where social power as a component of any relation comes into play.[29] Central understandings of authority are these of authority as relational, contingent and situational, or, of authority as a social power. [30] Social power is characterized by the chance of one person to impose his/her will against the will of another person.[31] Yet, authority should not be conflated with power, as it will soon be shown.

Sociologist *Max Weber* surely delivered key concepts of authority. *Weber* was principally interested in the issue of how authority was obtained. *Weber* identified three kinds of authority[32]: (1) rational-legal, depending for one's authority on the fact that laws have the appearance of necessity; (2) traditional authority, that is authority derived from long established customs, laws and practices, the sense that things have always been thus and should remain thus; (3) charismatic authority – the authority an individual claims or derives from a higher power, such as destiny or God. Certainly, the Abbasid judge derived his authority to a large extent from his appointment by the caliph, i.e. through a law-like decree, and applied law that is based on divine origin, thus combining both a rational-legal and charismatic adjudicative authority. However, this is not sufficient in explaining his authority vis-à-vis the jurisconsult, who too, relies on the *ius divinum* character of the law he applied and thus acquired charismatic authority. Vis-à-vis each other, these legal figures had to do more than refer to the divine character of the law to claim authority and instead both had to come up with substantiated legal reasoning, while the jurisconsult also needed to use persuasive and quasi-coercive modes of action to debate and create his authority towards the judge.

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[28] Bahrdt, *Schlüsselbegriffe der Soziologie* (2003), p. 166.

29 See Bahrdt, Schlüsselbegriffe der Soziologie, (2003), p. 166. For a study of social power of the market inspector (muḥtasib) as a further legal figure see, Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (2011).

[30] Rabe, "Autorität" (1992), p. 383.

[31] Max Weber's definition of power: "This power means any chance within a social relationship to enforce one's will even against resistance, regardless what this chance is based on." ["Diese Macht bedeutet jede Chance, innerhalb einer sozialen Beziehung den eigenen Willen auch gegen Widerstreben durchzusetzen, gleichviel worauf diese Chance beruht." Weber, *Wirtschaft und Gesellschaft* (1980), p. 28.

[32] Weber, *Wirtschaft und Gesellschaft* (1980), p. 122-142, 549-550.

In a succinct way, legal philosopher *Joseph Raz* suggests that "to have authority over people is to have normative power".[33] According to this view, to have power is to be able to influence people's actions and their fortunes. A person has effective authority if s/he is powerful, i.e. if s/he can influence people's fate and their choice of options. [34] For *Raz*, the best existing explanation of authority is that offered by John Lucas: 'A man, or body of men, *has authority* if it follows from his saying "Let x happen", that x ought to happen.'[35] *Raz* prefers this definition over many others. [36] In other words, to have authority does not merely consist of issuing commands for example in the form of judgments, but also by issuing authoritative counsel that has the potential to be followed, especially if it is formulated with reference to the divine origin of the law.
Additionally, authority could also be exercised through non-verbal behavior and communication (like, as we will see, the jurisconsult "merely" sitting in the court room or "merely" being present in the city). But the quote also underlines the significance of authority: To have authority is to have the right to rule[37], or differently put, to have authority is to have the right to decide on the law.

Authority in adjudication is a theme that has been central to the work of many scholars of diverse disciplines. European legal historians, and their respective national legal scholarship, have done tremendous work to re-construct legal authority as vested in the judiciary and affiliated personnel.[38] As European legal historian, *R. Ogorek* prominently picked up on two antagonistic *Leitbilder*[39] (guiding images) of judges in the 19th century,

[33] Raz, *The Authority of Law* (2009), p. 7.
[34] Raz, *The Authority of Law* (2009), p. 7. For several reasons there are shortcomings with this perspective: The notion of legitimacy is in fact the primary one. For one thing not all legitimate authority is effective. Besides, the notion of effective authority cannot be explained except by reference to legitimate authority. Raz, *The Authority of Law* (2009), p.8.
[35] Lucas, *The Principles of Politics* (1966), p. 16, as cited by Raz, *The Authority of Law (2009)*, p. 11.
[36] Raz, *The Authority of Law* (2009), p. 11-12.
[37] Wolff, *In Defense of Anarchy* (1970), 5:20, cited by Shapiro, "Authority" (2002), p. 385.
[38] A particular focus on European, particularly German *Justizforschung* was heralded by the Max-Planck Institute for Legal History in Frankfurt/Main, and several volumes of largely interdisciplinary research were published in Ogorek (ed.), *Aufklärung über Justiz* vol. I and vol.I, (2008); Gouron/Mayali, et al (eds.), *Europäische und amerikanische Richterbilder* (1996); Mohnhaupt/Simon(eds.), *Vorträge zur Justizforschung* (1992).
[39] Critically on how *Leitbilder* (guiding images) entail the danger of overriding legal argumentation, Baer, "Schlüsselbegriffe, Typen und Leitbilder als Erkenntnismittel und ihr Verhältnis zur Rechtsdogmatik" (2004), pp. 223-251, particularly pp. 249-250. This is relevant also for this study as the *qāḍī* has become the infamous *Leitbild* for an arbitrary judge in an arbitrary judicial system. For further prominently circulating guiding images of judges as, e.g., the "judge as captain", "the judge as oracle", the "judge as social engineer", see Gouron/Mayali, et al (eds.), *Europäische und amerikanische Richterbilder* (1996).

each bringing about a different type of authority.[40] It is the idea of the "judge as king" (*Richterkönig*) or the "judge as a subsumption machine" (*Subsumtionsautomat)* that embody the tension between judicial law application and judicial norm.[41] Depending on whether the judge is designed to be "unbound" by text (the judicial king) or restrained by text (the judicial machine or the *bouche de la loi*), scholars of the 19th century saw the judge's authority as respectively enlarged or reduced. These images capture the question of whether, and if so how, the judge can shape the law. Interpretations of judicial leeway were largely motivated by ideas of how the state wished its judicial policy to be interpreted.[42] According to European legal historian *van Caenegem,* the European continent then saw particular interest in discussing (and implementing) codification as "weaponry against the judiciary".[43] Islamic legal history, however, eventually sought control not exclusively in legal hermeneutics, and even less so in codification, but in an extrajudicial authority, guiding and controlling, collaborating with and critiquing the judge.

The dogma of binding the judiciary to the law seems to have stirred debate beyond times and locations. In the USA, the role of the judge in the law-making process also is a prominent theme of scholarship.[44] This hightened interest is closely connected to the case law system that invites a strong interpretative role of the judge. In early 20th century USA, *Roscoe Pound*, breaking new grounds for the US-Legal Realists, highlighted that the rules and norms are not the central elements in adjudication and advocated for an

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[40] Ogorek, *Richterkönig oder Subsumtionsautomat?* (1986). See also the particularly instructive series of articles on juristic, judicial and juridical method and judges "making" or "finding" the law, with respect to German legal history of the 19th century, Simon, "Der Wortlaut des Gesetzes- Auslegungsgrenze ode Freibrief?" (1993); idem., "Gibt es eine Methode der Rechtsanwendung"? (1995).

[41] Ogorek, *Richterkönig oder Subsumtionsautomat?* (1986), pp. 1-8. German legal historian *Luig* categorically associates, in the tradition of M.Weber, the Muslim judge to be a "Richterkönig", Luig, "Richterkönigtum und Kadijurisprudenz im Zeitalter von Naturrecht und Usus modernus" 1980, p. 295.

[42] See Falk, "Von Dienern des Staates und von anderen Richtern" (1996), p.253.

[43] Van Caenegem, *Judges, Legislators, and Professors* (1987), p 152. Critically on codification as a means to restrain the judge's authority, see for example Hassemer "Rechtssystem und Kodifikation" (2011), p. 252. On how codified legal text explicitly forbade the judge to interpret the law, see Hübner, *Kodifikation und Entscheidungsfreiheit des Richters in der Geschichte des Privatrechts* (1980), pp. 21-24, referring to Nürnberger Reformation (1479) and Bayrische Landesrechtsreformation (1518). See also Ogorek, *Richterkönig oder Subsumtionsautomat?* (1986), p. 21.
On failed attempts to codify Islamic law and its effects on the authority of judge and jurisconsult, see Chapter Four, II.

[44] See for example, Posner, *How Judges Think* (2008), Kennedy, *A Critique of Adjudication* (1997), Cardozo, *The Nature of the Judicial Process* (1921). Bryde explains the particular US-American interest in the judge with the personalization of adjudication, unlike adjudicative systems where the judge is guaranteed anonymity in the joint decision of the Chamber or the Senate, Bryde, "Juristensoziologie" (2002), p. See also Baer, *Rechtssoziologie* (2011), p. 34.

"extrajudicialism" to help explain why judges judge the way they do.[45] *Duncan Kennedy,* a prominent representative of the Critical Legal Studies movement, assesses the authority and consciousness of judges (and the "iconology" of judges created in the literature, to mention another idea of *Leitbild*) and the contexts of adjudication that takes uncertainty as the basis of the law and of adjudication.[46] Authority and uncertainty as a theme of legal hermeneutics will therefore be soon returned to. Legal scholar and Judge of the Federal Constitutional Court *Baer* stresses cross-references on legal indeterminacy between the German *Freirechtschule* and the US-American Legal Realists, and later Critical Legal scholars, and rightly postulates: "It is surely often wrong to refer an idea to one country or one big name".[47] In this sense, this study will draw on *multiple* experiences with authority in adjudication.

Sociological and socio-legal scholarship has enriched historical studies through empirical work (*Justizsoziologie*[48]), addressing questions of background, identity and politicization of the judiciary (but also of district attorneys, lawyers, etc.), shown by *R. Dahrendorf*[49], *Kaupen*[50] and *Lautmann*[51] as prominent examples of German scholarship of the 1960ies and 70ies. More recently, in Germany there is a renewed empirical interest (largely interview-based, *grounded theory*) of studying the judiciary, with *Kranenpohl*, *Berndt*, and *Kauffmann*, reflecting on sociological theories of self-images and typologies.[52] The

[45] Pound, "The Call for A Realist Jurisprudence" (1931), p. 705.
[46] Kennedy, *A Critique of Adjudication* (1997); idem., "Judicial Ideology",(1996), pp. 785-825; idem., "Freedom and Constraint in Adjudication: A Critical Phenomenology", (1986) pp. 518- 562.
[47] Baer, *Rechtssoziologie* (2011), p. 145. The closeness of theories, she says, between the German *Freirechtsschule* and the Critical Legal Realists, is not a coincidence but a result of a series of dialogues between the protagonists. She refers to the book "The Science of Legal Method" (1917) which appeared in the USA as a translation of the most important texts of the *Freirechtsschule*, including François Geny, "Méthode d'interprétation et sources en droit privé positif" and Eugen Ehrlich, "Freie Rechtsfindung". Also, Benjamin Cardozo's influential book "The Nature of Judicial Process" (1921) employs and quotes from the works of Geny, Ehrlich, Kantorowicz. *Baer* also refers to the exchange of ideas and friendship between Kantorowicz and LLlewellyn.
[48] *Justizsoziologie* has established as a traditional branch of legal sociology in Germany, see Rehbinder, *Rechtssoziologie* (2009), pp. 125-139; Rottleuthner, *Rechtssoziologie* (1987), pp. 100-106; Rottleuthner, "Abschied von der Justizforschung?" (1982); Baer, *Rechtssoziologie* (2011), on legal personae (*Rechtsstab* in general) pp. 157-180, and judges in particularly, pp. 162-168; Röhl, *Rechtssoziologe* § 41 "Die Juristen", pp. 364-374;; Bryde, "Juristensoziologie" (2000).
[49] Dahrendorf, "Bemerkungen zur sozialen Herkunft und Stellung der Richter an Oberlandesgerichten" (1960), and more generally on the social background of jurists in Germany, Dahrendorf, *Zur Soziologie der juristischen Berufe in Deutschland* (1964).
[50] Kaupen, *Die Hüter von Recht und Ordnung* (1969).
[51] Lautmann, "Justiz von innen betrachtet" (1970); idem., "Rolle und Entscheidung des Richters" (1970); idem., *Justiz- die stille Gewalt* (1972).
[52] Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnis* (2010); Berndt, *Richterbilder (2010);* Kauffmann, *Zur Konstruktion des Richterberufs durch Richterleitbilder* (2003).

"end of the research on the judiciary?" [53], as socio-legal scholar *Rottleuthner* asked with regard to German scholarship thus has thankfully not materialized.[54] His caution of not doing research on the judiciary without taking into consideration the law remains a necessary reminder to not separate, in my own terms, the *authority of the law* from the *authorities in the law*. With an increasingly intersectional focus on who was (not) considered a legal authority, and who did (not) become judge, feminist critical scholars[55] as well as race critical scholars[56] significantly contributed by stressing how authority was established through bias, stereotypes, discrimination and exclusion.[57]

Within contemporary Islamic legal scholarship, studying the authority of legal personae in Islamic legal history is a long established tradition, particularly with the scholar-jurist (and the school of law) as the core constituent of Islamic jurisprudence. The role of the judge has at times been highlighted, but nevertheless marginalized compared to the scholar-jurist, and has been barely systematically studied. Few exceptions are scholars of Islamic law and legal h istory like *Hallaq*[58] and *Schneider*[59], *Müller* (with reference to Cordoba)[60], *Conrad (with reference to Syria)*[61], *Kasassbeh*[62], *Moukdad*[63], *Dannhauer.*[64] There works have been used extensively, though none has studied the relationship of authority between judge and any other extrajudicial authority in making the law.

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[53] Rottleuthner, "Abschied von der Justizforschung?" (1982).

[54] For a concise overview over German scholarship on the socio-legal role of the judge, see Bryde, "Juristensoziologie" (2002).

[55] See for instance, Schultz/Shaw (eds.), Gender and Judging (2013), pp. 3-47; Wikler, "Researching Gender Bias in the Courts" (1993), pp. 49-61. More generally studying gender bias in US-American courts, Schafran "Gender Equality in the Courts" (1993). On Muslim judges in early legal history, Moosa, "Women's eligibility for the qadiship" (1988), pp. 203-227. For questions of gender in early Muslim courts, see Tillier, "Women before the *qāḍī* under the Abbasids" (2009), pp. 280-301. For a feminist critical cross-temporal study of female judges in Muslim societies see Noriani, Nik / Badlishah, Nik/ Masid, Yasmin *Women as Judges (*2009); Abdelkader, "To Judge or Not to Judge" (2014), pp. 1-71.

[56] Johnson, "The Under-Representation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective" (1997); Collins/Moyer, "Gender, Race, and Intersectionality on the Federal Appellate Bench" (2008); Edwards, "Race and the Judiciary" (2002); Solanke, "Diversity and Independence in the European Court of Justice" (2008-2009), particularly, pp. 111-115. On questions of race and ethnicity in the make-up of the Abbasid judiciary, see Tillier, *Les Cadis* (2009), pp. 367-378; See also Kunkel for significance ethnic background of Roman legal authorities, *Die römischen Juristen* (2001), pp. 20-24, 27.

[57] More generally on questions of "representations and abstractions" in adjudication, as well as, briefly, intersectionality (gender, race, class, sexual orientation, ageism, and ableism) and authority, see Resnik/Curtis, *Representing Justice* (2011), pp. 106-107-108, 111-116. On early Muslim debates involving aspects of intersectionality and qualifications for the tasks as judges and jurisconsults, see Chapter Two, V. 1.

[58] Hallaq, *The Origins and Evolution of Islamic Law* (2005).

[59] Schneider, *Das Bild des Richters in der "Adab al-Qadi"- Literatur* (1990).

[60] Müller, *Gerichtspraxis im Stadtstaat Cordoba* (1999).

[61] Conrad, *Die Qudāt Dimashq und der madhhab al-Auzā'ī* (1994).

[62] al-Kasassbeh, *The Office of Qāḍī in the Early ʿAbbāsid Caliphate (1990).*

[63] Moukdad, *Richteramt und Rechtswesen in Bagdad (1971).*

[64] Dannhauer, *Untersuchungen zur frühen Geschichte des Qadi-Amtes* (1975).

Renewed and important interest has been shown by the historically erudite M. Tillier in *Les Cadis d'Iraq et l'État Abbasside (132/750-334/945)*, and for Egypt *Vies des cadis de Misr 237/851-366/976*, studying judicial authority almost exclusively with respect to state authority. Works on the *muftī* are plenty, almost all with respect to the work of private opinion-giving, and none on the *muftī* as part of adjudication.[65]

Many in the field of Islamic law deal with the process of authority through the established schools of law, and how the eponyms of the schools were constructed by their scholarly followers as ideal of legal authority.[66] Scholar of Islamic law *W. Hallaq*, for instance, diachronically examines the doctrinal relationship of judge and jurisconsult, with particular focus on the work of Shihāb al-Din Qarāfī (1228–1285) on the difference of judgment (*ḥukm*) and legal opinion (*fatwā*) and judge (*qāḍī*) and jurisconsult (*muftī*).[67] *W. Hallaq* considers the *muftī* to be the "legal reasoner par excellence"[68] while the *qāḍi* in Islamic legal history "applies the law much as a bureaucrat applies administrative rules".[69] Though *Hallaq* mentions the rich biographical and theoretical legacy of Islamic judges, he links his findings to his reading that the *qāḍī's* qualifications and credentials are omitted in the works of legal theory while jurists provided a rich body of discourse related to the jurisconsult. As the schools' demarcation lines become evidently more visible in the fourth/tenth century onwards, he not only opted for a later period, which brings about different results, but he did so also through the then consolidated lense of the school of law as an institution of authority that informs the authority of individuals, in particular that of its own scholars. Scholar of Islamic law *Sherman Jackson* in his *Islamic law and the State* also refers to the works of jurist Shihāb al-Dīn al-Qarāfī to stress that scholars of Islamic law have long being focusing on content and barely on the authority and authorities bringing in an argument- and have thus missed out on an important dimension of explaining Islamic law. He rightly asserts that "[t]he fact that it is not necessarily the content of a view that gains acceptance but rather the authority to which it is able to attach itself has not, in my view, been duly recognized by modern

[65] An important exception are the works on *muftīs* in Muslim Spain where there formally part of the judicial system, see for example Marín, "Šūrā et ahl al-Šūrā dans al-Andalus (1985), pp. 25-52; Bosch-Vilá, *The Administrative History of al-Andalus* (1984).

[66] On the construction of authority in the schools around their school eponyms see in particular Hallaq, *Authority* (2001) for Abū Ḥanīfa in the Ḥanafī school pp. 24-31; for the Mālikī school with respect to Mālik, pp. 31-36; for Shāfi ī, pp.36-39; for Ibn Hanbal, pp. 39-42.

[67] Qarāfī, *Al-Iḥkām fī Tamyīz al-Fatāwa 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wal-Imām*.

[68] Hallaq, *Authority* (2001), p. 76.

[69] Hallaq, *Authority* (2001). p. 76.

scholars of Islamic law."[70] In analyzing Qarāfī, *Jackson* rightly establishes a functional distinction between content and authority, and calls for a greater emphasis on authority, as opposed to content to shed light on a number of legal phenomena.[71] This call is heeded to in this work.

It is against the backdrop of the mosaic of these major research fields, that I would like to contribute to the question of how legal personae debate and create authority vis-à-vis each other, highlighting examples of Islamic legal authorities.

a. Authority as Relation between Legal Personae

The works of legal philosophers *Joseph Raz* and *Scott Shapiro* have built on thick layers of scholarship on authority. They both show that a continuous and contemporary discussion of authority is unabated and demonstrate crucially important analyses of the concept of authority and its relation to law and its legal personnel. In particular, they offer aspects of coercive and persuasive authority, as well as discuss the prominent theme of authority and autonomy which is also addressed by Muslim jurists Khaṣṣāf and Shāfiʿī, as substantiated in Chapter Two. They take up relational aspects of authority which will come to the forefront of this study.

In a brief methodological *tour d'horizon* of how authority has been studied so far, *Raz* determines four of the common types of explaining the nature of authority, focusing on legitimate conditions, effective conditions, ability, and rules.[72] The way they are used here also, in part, explains the structure of the whole work. *Raz* explains that most authors explain authority in terms of as 1) legitimate authority; 2) effective authority; 3) effective authority as power over people; and 4) authority conferred by a system of rules.

One way is by describing the necessary or sufficient *conditions* for holding what is considered *legitimate authority*. Accordingly, authority is indicated by one being either capable or justified of doing certain actions.[73] Being perceived as being capable or

[70] Jackson, *Islamic Law and State* (1996), p. xxxi.
[71] Jackson, *Islamic Law and State* (1996), p. xxxii.
[72] Raz, *The Authority of Law* (2009), p. 5-12. Here Raz refers to the common methodological approaches to the nature of authority. For Raz, all these approaches encompass shortcomings as they describe authority instead of analyzing the core, the nature of authority, or as Raz puts it "one has to explain what one has when one has authority" (p.7). Despite Raz' critique, the approaches are helpful to dissect foundational aspects of authority.
[73] Raz, *The Authority of Law* (2009), p. 5.

justified comes with having knowledge and expertise. Authority as employed to denote knowledge and expertise so that they may persuade to follow or even go as far as impose an obligation to do as directed by the person who has this knowledge and expertise. Legitimate authority thus focuses on knowledge as a condition, or base, for authority.
The expertise of legal personae of Islamic law, their qualifications and justifications for their respective functions as judge and jurisconsult, are laid down in juristic early writings. Knowledge, especially expert knowledge of the law, is particularly crucial in a dynamic and diverse system such as Islamic law in the formative period where many methodological and substantial questions were open. It soon becomes obvious, though, that the authority relationship between judge and jurisconsult in early Islamic legal history was not primarily conceived through an asymmetry in knowledge or expertise in law *per se*. Rather, different legal doctrines on the one hand, and uncertainties where the law left ample room for legal reasoning within and beyond the text opened the door to debate and create authority between judge and jurisconsult. Legitimate authority constellations as based on relatively symmetrical knowledge will be key for Chapter Two.

A second approach regards authority as *ability* to perform certain kinds of action, and identifies effective authority with power over people. Accordingly, authority is measured by the ability to require action. A person has effective authority if s/he is powerful, if s/he can influence people's fate and their choice of options.[74] Such an ability raises questions concerning the autonomy of the subject, because the ability to require action does not seem to allow the subject to determine for himself what action to engage in. [75]
Muslim legal authors have normatively discussed the authority of a jurisconsult to potentially require the action of a judge and in how far and in how far judicial autonomy is restricted or guided by the advice of the jurisconsult (see Chapter Two). A study of authority in action, also analyzes the empirical encounters of jurisconsult and judge, and the effect these encounters have on the judge's autonomy. Chapter Three will demonstrate that the jurisconsult had the authority, i.e. influence to change the judge's fate and his choice of options.

[74] Raz, *The Authority of Law* (2009), p. 7.
[75] May, *Autonomy, Authority and Moral Responsibility* (1998), p. 128.

A third way of explaining the nature of authority is to elucidate the *conditions* for holding *effective authority* is by elucidating under what conditions legal actors obtained or held authority, under what circumstances a legal community is likely to accept the authority of some persons. [76]

Effective authority based on conditions, in particular organizational ones, allowed legal actors to obtain or hold authority. It will be seen, in Chapter Four, how caliphal or state action set an extensive framework for judicial or juristic work allowed authority to be acquired and held. So far, the organizational, professionalized, bureaucratized authority of the office (*Amtsautorität*) or authorization to dispense justice was barely seen in conjunction with the much less formalized authority of the jurisconsult-scholar. It is this work's aim to bring both spheres of authority together, also on the organizational level, to help elucidate a more comprehensive picture of legal and juridical authority.

As a fourth approach, authority can be defined by reference to *rules*: that a person has authority means that there is a system of rules and that the action done is based on, for example, a law, by license, or by certificate.[77] Rules confer authority. One may have authority when rules addressing the normative questions regarding the actions of authority exist. [78] All legal authorities have authority in this sense.[79]

Some early Islamic legal literature (the Etiquette of the Judge genre) entails normative elaborations concerning when the judge is to solicit the opinion of the jurisconsult. But these norms do not provide any clear means of deciding which rules confer authority and which do not, and the rules differ from school to school. Some rules will confer authority quite explicitly. This is the case for the rules governing the tenure of the judge, making him a state authority. However, the rules in the Etiquette of Judges as the only normative document specifying the relationship of judge and jurisconsult have no authoritative, imperative formulations. While no one contests that authority exists, when rules confer this authority, it is more difficult to grasp what makes an authority legitimate when no such rules are conferred, like in the case of the jurisconsult.

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[76] Raz, *The Authority of Law* (2009), p. 5. For Raz, this approach fails to explain what these conditions are for, what it is to have authority or to be in authority. Raz critiques that authority cannot exclusively consist of elucidating the *conditions* under which one has either legitimate or effective authority, authority rather needs to be assessed as an *ability* to perform certain kinds of action. Raz, *The Authority of Law* (2009), p. 7.

[77] May, *Autonomy, Authority and Moral Responsibility* (1998), p. 128.

[78] Raz, *The Authority of Law* (2009), p. 9. For Raz, the proposed rules of authority do nothing to illuminate their meaning and effect. Instead, the very claim that all authority is conferred by rules is itself debatable.

[79] Shapiro, "Authority" (2002), p. 386.

In the course of this work, the aspects of effective and legitimate conditions, ability and rules will be further qualified to allow for criteria to capture the non-delineated relationship of judge and jurisconsult. Precisely because their relationship is barely formalized, this work aims at delivering indicators for non-determined lines of authority/ies.

One last word on authority and the difficult relationship on power: Authority as a way to effect change brings up the question of authority as power, and, in a later step, authority as rule. Authority and power are categorically distinct, in opposition and correlation.[80] They cannot and should not be easily separated. And it becomes clear that authorities claim a right of immense power.[81] To have power is to have the ability to compel others to do as one wants; power relates to the ability to affect obedience.[82] Power can consolidate, build up or accumulate to rule.[83] However, the judge can affect obedience only over the litigants or subjects of his jurisdiction and only through his decisions–not over the jurisconsult. The jurisconsult, similarly, has authority but not necessarily power[84], as he can not affect obedience of the judge. Thus, while judge and jurisconsult both claim a right of immense power, they do not have the ability to compel each other to do was they each want, nor can they affect obedience vis-à-vis each other, and therefore do not rule over each other.

b. Coercive, Persuasive, and Quasi-Coercive Authority of Legal Personae

Authority is generally conceived of as effecting change in a given situation.[85] This conception will be reflected in the relationship between judge and jurisconsult in Islamic law. The challenge of this work thus lays in bringing about different authoritative nuances of the legal personae involved. The judge (*qāḍī*) is a legal authority both because the rules of official state appointment granted this power to him (see above the fourth approach of authority, authority conferred by rules) and also because of his knowledge in law, especially when he is a member of the scholarly class of jurists (see

[80] In the Roman legal tradition, *auctoritas* counted as a central political notion in evident opposition and correlation to *potestas*. Rabe, "Autorität" (1992),p. 383.
[81] Shapiro, "Authority" (2002), p. 383.
[82] Shapiro, "Authority" (2002), p. 383.
[83] Bahrdt, *Schlüsselbegriffe der Soziologie* (2003), p. 166; According to Weber, „Herrschaft soll heissen die Chance, für einen Befehl bestimmten Inhalts bei angebbaren Personen Gehorsam zu finden", Weber, *Wirtschaft und Gesellschaft* (1980), p. 28.
[84] Berkey, *Popular Preaching and Religious Authority* (2001), p. 89.
[85] Shapiro, "Authority" (2002), p. 386.

legitimate authority, based on knowledge). Judicial authority through the judgments issued is binding, sanctioning and enforceable, i.e. coercive. The jurisconsult (*muftī*) is first and foremost an independent legal scholar. He can issue legal opinions and consult in legal affairs, but his advice is non-binding, and carries, at best, the weight of being persuasive. The change effected through the authority of force and the authority of argument will each be analyzed as a way to effect what emerged as Islamic law. Additionally, I would argue that there is a third form that characterizes authority, namely quasi-coercion, i.e. coercion that is effected by the will of a person without coercive authority who can involve a third party with such authority, namely the caliph upon whose authority the judge's position ultimately depends. And so in fact, while the judge's authority is coercive, a closer look reveals that the jurisconsult's authority seems to be ambivalent and alternating between persuasive and quasi-coercive authority. Both persuasive and quasi-coercive authority grant the jurisconsult types of authority that, in conclusion, have the power to effect change over the judge and his adjudication. Yet, this trio of categories of authority was not considered in Muslim jurisprudence, and was studied only rudimentary, at best, by succeeding scholars of the formative period.

Authority is coercive whenever there are state enforcement mechanisms at place that make you accede to the demands of the judiciary. Thus, law as an institution is *per se* coercive, and with it all those administering it. Thus the authority of the judges is coercive, their verdicts effect change for the parties involved. Therefore, coercive authority has been one of the central themes of the study of law.[86] *Max Weber*, for instance, considered the order of law to be coercive "when it can be externally guaranteed by the chance of (physical or psychological) *coercion* to enforce the observance or punishment in case of violation through a *specific staff* of people."[87] [italics in the original]

Accordingly, law is characterized through the existence of a staff of legal personae with sanctioning powers that can en*force* the maintenance of the legal order and pursue violations of the law.[88] The legal order is coercive, and with it those administering the

[86] On understandings of coercion in law as historically contingent, Edmunson, "Coercion" (2012), p. 452-454 on understandings of coercion in law to be historically contingent.

[87] "Eine Ordnung soll heißen: […] b) *Recht*, wenn sie äußerlich garantiert ist durch die Chance (physischen oder psychischen *Zwanges* durch ein auf Erzwingung der Innehaltung oder Ahndung der Verletzung gerichtetes Handeln eines *eigens* darauf eingestellten *Stabes* von Menschen." Weber, *Wirtschaft und Gesellschaft* (1980), p. 17.

[88] See also Baer, *Rechtssoziologie* (2011), p. 120; Raiser, *Grundlagen der Rechtssoziologie* (2009), p. 89-90.

legal order and commanding the legal order to be en*forced*, the judges. Coercion is understood here as the binding power of the judgment, enforceable even against one's (the party's) will by use of state enforcement (police power, or in Arabic: *shurṭa*). Thus every judgment that is, per definition, enforceable, binding and sanctioning entails coercion. Judicial authority is coercive authority.

Persuasive authority, on the contrary, cannot recur to force.[89] According to *M. Weber*, authority describes the ability or chance to have one's rules and rulings followed, or obeyed *without* recourse to coercive power. In this way, it is the authority without being authoritarian, i.e. resorting to power of sorts, for example through the power of argument. It is indeed the very absence of coercion that for *M. Weber* distinguishes authority (*Autorität*) from power (*Macht*).[90] More precisely, authority cannot be based on force or threat of force alone; it is dependent on influence and acceptance.[91] If a particular power is perceived as legitimate and has authority, then we accede to its demands without the need of coercion or threat[92], therefore, for *Weber*, authority is intimately linked to the notion of legitimacy.[93]

Authority and persuasion come through argumentation.[94] Persuasion of the argument or persuasion of the counsel [95] is the basis for the authority of the jurisconsult. It is the power of the argument, which, in fact, is non-binding and not enforceable in nature, yet can effect change. Persuasion is a successful intentional effort at influencing another's mental state, behavior or action through communication in a circumstance in which the persuadee has some measure of freedom.[96] For the purposes of this study, I will focus on what is documented in the historic records, mainly evidenced behavior and actions of

[89] Theoretical work on persuasion dates back millennia, to classical treatments by Aristotle and Cicero. A variety of different general theoretical perspectives on persuasion have been articulated. These can usefully be glossed as forming three broad kinds of approaches: attitude theories, voluntary action theories, and theories of persuasion proper, see O'Keefe, "Theories of Persuasion" (2009), p.270.

[90] Weber *Wirtschaft und Gesellschaft* (1980), p. 28-29, 542, 545.

[91] Raz, *The Authority of Law* (2009), p. 29.

[92] Weber, *Wirtschaft und Gesellschaft* (1980), p. 122-123; Buchanan, "Authority", (2010), p. 33; Parson, "Introduction", *The Theory of Social and Economic Organization*, by Max Weber (1947), p. 68.

[93] Legitimacy and authority are not the same, though there can be legitimacy through authority. See the typologies of rule (Herrschaftstypologie) by Weber, *Wirtschaft und Gesellschaft* (1980), pp. 122-176.

[94] On the difficulty of disentangling the phenomena of argumentation and persuasion, see O'Keefe, "Conviction, Persuasion, and Argumentation" (2012), p. 20. For the aspect of persuasion as rhetoric as discussed by Islamic thinkers see, Halldén, "What is Arab Islamic Rhetoric?" (2005).

[95] For the question of persuasion and authority in Islamic law from an Aristotelian rhetorical perspective (*ethos*, *pathos*, *logos*), see Tomeh, "Persuasion and Authority" (2010), p. 171. Tomeh states that "[t]he stronger the relationship that *ethos*, *pathos*, and *logos* respectively have with God, the more persuasive the argument, and the more authority the argument can claim".

[96] O'Keefe, *Persuasion* (2002), p. 5.

judges. Thus central objects of influence will be the judge's decisions, their deliberations thereupon, or their behavior in anticipation of or after a jurisconsults' positioning. The judge as a potential persuadee enjoyed a range of freedoms and independence in his judicial decision-making practices. And it is within the margins of judicial evaluation that the jurisconsult's communicated counsel, whether solicited or unsolicited, has the potential to influence the judge.

Persuasiveness excludes formal obedience, submission or compliance to an exercising authority. In fact, the judge acted not in a formally authoritative relation to the jurisconsult, there was no formalized sanctioning mechanism in place to delineate the relation of authority. Thus a judge accepting the counsel of a jurisconsult remained free and autonomous to choose his options. Whether or not legal consultation is followed, rests, not only in Islamic legal theory, with the one who questioned the legal advice who remains fully autonomous in his/her decision. [97] What is considered persuasive rests with the questioner. For any given opinion, there are no clearly agreed standards of what could be considered persuasive to a judge.[98] Though the persuasive opinion or advice lacks the certainty of implementation, it could amount to more than a recommendation and less than a command that is hard not to follow.[99] This ambivalence will become apparent in the actual encounters of judge and jurisconsult.

The recommendation, despite its persuasiveness, could thus also be turned down–a fact also evidenced in the encounters of judge and jurisconsult. The behaviors that persuaders characteristically seek to influence are voluntary actions, ones under the actor's control.[100] The philosophical question, in how far persuasion through counsel was actually restricting or enhancing the autonomy of the persuadee, the judge, is thus a critical one that was addressed in the consulted early Muslim juristic scholarship as well as in Anglo-Amercian legal philosophy.[101]

Persuasive authority can be based on the normative beliefs ascribed to particular important others.[102] The persuasive authority of a jurisconsult is intimately connected by

[97] On Voluntary Action Theories and their aims at identifying the factors that influence voluntary action, see O'Keefe, "Theories of Persuasion" (2009), p. 278-281.
[98] Kennedy speaks of "convincingness", *Critique of Adjudication* (1997), p. 90.
[99] Rabe, "Autorität" (1992), p. 383.
[100] On Voluntary Action Theories and their aims at identifying the factors that influence voluntary action, see O'Keefe, "Theories of Persuasion" (2009), p. 278-281.
[101] On autonomy of (judge) and authority (of jurisconsult), see in particular Chapter Two, V. 2.c.dd.
[102] O'Keefe, "Theories of Persuasion" (2009), p. 280.

virtue of his knowledge and status – self-chosen or imposed by any questioner – as someone answering questions related to the lives of Muslims. So when a judge believes that a jurisconsult is equally or more knowledgeable in the legal specificities of a local jurisdiction or the methods of a locally dominant school of law, the judge makes the jurisconsult an authority. But it will be seen that knowledge and status as typical elements of authority are not the only, and not the decisive factors. Rather, it is the juristic consciousness of the uncertainty of law, the risk involved in finding, or applying, or making the correct law that affects the occasion of consultation, especially in a system of *ius divinum* that grants the law and its representatives a a significance of the first rank in discerning the law.

The validity of the legal text production of judge (the judgment) and of jurisconsult (the legal opinon) similarly reflects coercion and persuasion.[103] The judgment in Islamic law (*ḥukm*) is the result of a particular and concrete litigation case. It is applied law unique to only the parties and event being judged (*inter partes*); it is coercive and enforceable by the police (*shurṭa*) (external forum). It is valid unless it is reviewed or annulled by another judicial authority. The legal opinion (*fatwā*) or counsel (*mushāwara*) can be solicited or unsolicited, requested by a judge or a lay person, for or independent of a case of litigation. It is non-binding *per se*, and becomes binding only if the person voluntarily accepting the counsel for him- or herself considers it persuasive and decides to follow it. The legal opinion (*fatwā*) as a legal product had validity only in so far and in so long as the person accepting it, grants it validity by following it (internal forum).
Based on the acknowledgment of the *muftī*'s knowledge by the judge, the *muftī* could thus deliver a non-binding advisory opinion that then made its way to court, where the *fatwā* changes its nature so radically that it could become binding *inter partes*.

The source-material suggests that there is a further form of authority, *quasi-coercive authority*. In some instances, the acceptance of counsel is more than merely voluntary to the extent that depending on the circumstances the issued counsel, or the legal opinion can have an authoritative effect, coming close to being obligatory. I would argue that there is a further dimension of authority characterizing the relationship of judge and jurisconsult, that of quasi-coercive. This is when the non-coercive authority involves a

[103] On judgment and *fatwā* compared as typologies, see Chapter Two, I.

third party that can effect coercive change. It means that the jurisconsult used a political authority to affect the changes he wished on the judge. This signifies that despite his confined persuasive authority, the jurisconsult could nevertheless involve a party with coercive powers to affect the results he thinks fit. In this sense, the jurisconsult exerted, additionally to his persuasive authority, quasi-coercive authority by involving the political authorities who could coerce the judge, e.g. by removing him from his office. Here the distinction between authority and power becomes blurred. The jurisconsult as a legal scholar could not remove the judge from office, he did not have the power to do so. But the jurisconsult's disapproval of the judge could amount to the caliph removing the judge from office. In that sense, it was authority in the Weberian sense as the scholar was acting without recourse to coercive power himself. Yet, his power was quasi-coercive, namely whenever he took recourse to the coercive powers of the ruler. The third person with coercive powers can be involved directly or indirectly: Even if the judge might not ascribe the jurisconsult having authority over him, it suffices that the jurisconsult was recognized to have authority on affairs of adjudication by the third person who holds coercive powers, the caliph or his executives. As the judge was financially and for this social prestige dependent on the caliph, he was, by extension, dependent on those the caliph considered to have (extra-) judicial authority like the jurisconsult to, as someone who could and did make recommendations for appointing or removing judges from office. The authority of the jurisconsult became quasi-coercive through the call for external intervention of the caliph into the organization of the judiciary. The caliphs then "lend their sword to the men of the pen"[104], to use a dramatic metaphor. Caliphs, mostly, allowed their coercive power to be referred to and effected by jurisconsults in their encounter with judges. Quasi-coercive authority works with the appeal caused by threat. As will be shown, it is evidenced that the caliphs took into consideration the jurisconsults' counsel on who to appoint or remove from the office of judge. Judges knew that jurisconsults had quasi-coercive authority to effect change in the position of the judge. This has fundamentally influenced the relationship of judge and jurisconsult, and lead to calculated behaviors of judges, facing the constant threat from jurisconsults, as evidenced in Chapter Three. Even quasi-coercive authority is based on a voluntary behavior, though one that responds to the aim of protective or preventive behavior. The judge reacts to the threat appraisal (the person's assessment of the potential threat) and

[104] Krämer/Schmidtke, *Speaking for Islam* (2007), p. 11.

the coping appraisal (the person's assessment of a given "coping" response), that is, a given protective behavior.[105] A judge not wanting to lose his job or wanting to avoid being summoned to the caliph had to assess these threats and cope with them: He had to reckon with the jurisconsult.

As a result, authority as coercive, persuasive, and quasi-coercive modes can thus be encapsulated as follows: To have the authority to adjudicate is to have the authority to be obeyed.[106] To command is to ask an act to be performed for the reason that it was commanded. Commands, as in the form of judgments, are coercive and automatically affect the lives of the commanded. Commands, therefore, differ from arguments, because arguments are meant to persuade.[107] They attempt to persuade the person that they ought to act in certain ways and they do this by presenting to the addressee the reasons that make the counsel worthy.[108] When real or imagined threats – potentially realized by a third person – accompany the counsel, acceptance of the counsel is not merely based on persuasion of the argument anymore. Counsel can then become more than an advice and less than a command. It then is quasi-coercive. The exemplified relationship of judge and jurisconsult demonstrate these different modes of authority.

c. Authority and Autonomy in a Religious Legal Order

Crucially, authority needs to be discussed also in its conflict with autonomy, a problem known as the "paradox of authority", addressing the alleged incompatibility of authority with autonomy or reason.[109] Legal philosophy is home to the debate if a recognition of authority at the same time means a renouncing of autonomy.[110] A philosophy of law approach is adapted when the term 'authority' is used to indicate an ability to require

[105] See O'Keefe, "Theories of Persuasion" (2009), p. 282.
[106] Shapiro speaks of the right to rule as a right to be obeyed, "Authority" (2002), p. 386. Arguably, authority can be seen as a right (to effect change) and adjudication as a form or rule, as its judgments claim obedience.
[107] See Shapiro, "Authority" (2002), p. 386.
[108] See Shapiro, "Authority" (2002), p. 386.
[109] See, Raz, *The Authority of Law* (2009), p. 25-27.
[110] On the dichotomy between autonomy and authority, see for instance, Sennett, *Authority* (1980), pp. 15-19, 85-97 who also speaks of the "fear of and need for authority" while struggling to keep ones autonomy; May, *Autonomy, Authority and Moral Responsibility* (1998); Shapiro, "Authority" (2002), p. 385-386; Raz, *The Authority of Law* (2009), p. 25-27. Insightful and with reference to the judge caught between autonomy and the authority of the legislative text, see Jhering on the "Autonomie des juristischen Denkens", *Geist des römischen Rechts*, (1877), III, p. 309. For a discussion of Jhering and juristic autonomy, see Ogorek, Richterkönig oder Subsumtionsautomat?" (1986), pp. 222-228.

actions of the autonomous other.[111] It is this authority as it affects the autonomy and agency of those subject to the authority.

The situation is further complicated by the fact that both legal personae act in a religious legal system necessitating its scholars to define how much human agency in a divine system was conceived as possible. To some, autonomy and authority clash[112], just as much as human agency in a divine legal system.[113] *In concreto*, the question is whether the autonomy of a religious law-informed judge can be reconciled with the authority of a religious-law informed jurisconsult. More generally, can *any* judge take an autonomous decision on adjudication when faced with the persuasive authority of a jurisconsult?

In light of these concerns, I will move between some of the fundamental questions of the philosophy of law and a cautious re-reading of Islamic normative material.
The key question here is whether the recognition of the jurisconsult's expertise and authority at the same time meant a renouncing of the judge's autonomy, or, differently put, if autonomy can be reconciled with authority. If authority and autonomy are fundamentally incompatible, as some contemporary scholars believe they are[114], we are faced with a serious paradox concerning the individual freedom, and responsibility, of the judge.[115] Thus, the question of autonomy translates into normative questions surrounding the actions of the judge in the face of an extrajudicial authority.[116] Authority as the ability to require action raises questions concerning the autonomy of the subject, because the ability to require action does not seem to allow the subject to determine for herself what action to engage in. [117] It is easy to see why many philosophers maintain that obedience to authoritative directives is simply incompatible with autonomy: Acting on

[111] May, *Autonomy, Authority and Moral Responsibility* (1998), p. 128.
[112] Robert Paul Wolff has prominently argued that legitimate authority and moral autonomy are logically incompatible, Wolff, *In Defense of Anarchy* (1970).
[113] Islamic law scholars like Joseph Schacht and others often considered that human agency in Islamic legal thought plays a minor role and is confined to finding and applying the laws to the case in question. Human agency in the interpretation or making of the law is almost entirely neglected. Schacht, *An Introduction to Islamic Law* (1964). At the other extreme, the proponents of "Kadi-Justiz" consider the *qāḍī* to act arbitrarily, according to his whims and detrimental to the principles and rules of law, totally overstretching concepts of agency at the expense of a system of legal and judicial rules, objectivity and impartiality. See these two models of denying or overstating human agency, Emon, "Human Legalislative Authority" (2004), p. 2-3.
[114] See Wolff, *In Defense of Anarchism* (1970).
[115] May, *Autonomy, Authority and Moral Responsibility* (1998), p. 127.
[116] Generally on the normative questions of the actions of the subject, May, *Autonomy, Authority and Moral Responsibility* (1998), p. 128.
[117] May, *Autonomy, Authority and Moral Responsibility* (1998), p. 128.

what the authority holds ought to be done appears to circumvent one's own evaluational judgment, and thus autonomy. By circumventing the evaluational judgment of the subject, it seems the subject is prevented from acting on his own determination of what ought to be done.

In contrast to these debates that juxtapose authority and autonomy, we will see that early Muslim jurists were keen to emphasize that judgments emanate from the judge's authority and autonomy alone, also when advised by the jurisconsult. The elaborations on extrajudicial authority in adjudication underline that even when the judge adopts others' opinions, he is constantly warned by Islamic legal scholars not to let others' advice replace his own legal reasoning, his own evaluational judgment. Within the normative debate which is eager to keep the autonomy of the judge intact, the jurisconsult's authority is designed to affect the judge's reasoning, rather than replace it.[118]

The entire debate about authority and autonomy is additionally complicated by the fact that legal authorities needed to engage with a religiously sanctified law. The first, and primary sources for guidance are the Qur'ān, and the normative practice (*Sunna*) of the Prophet Muḥammad as known through reports (*ḥadīth*) about his words and deeds that circulated first orally and then, by the ninth and later centuries in the written form. The Qur'ān and the Sunna provide the principles of law, even details on some topics, but do not touch on all questions of law. Consequently, Muslims developed a sophisticated theory of law (*uṣūl al-fiqh*) to work out a more comprehensive system of Islamic jurisprudence (*fiqh*) that still made ample room for the contingencies of human experiences.

The question of human agency or autonomy is relevant in the sense that the legal personae take the role of interpretive mediator between the text and the determination of law, also in the adjudicatory process. In fact, it is not the case that pre-modern Muslims simply required jurists to look to text, or – to the other end– to adjudicate on the grounds of mere convenience and arbitrariness. Rather, they acknowledged that the individual jurist was in a position to participate in the construction of the law based on a legal, theological and philosophical framework that recognized that human beings generally

[118] See the scholarly elaborations on extrajudicial authority and the judge by Khaṣṣāf and Shāfiʿī, Chapter Two, V. 2.a.

make determinations of many kinds.[119] Room for agency in the construction of rules in Islamic law, and the nature of that authority has been a recurring theme in Islamic legal scholarship, especially whether that determination of law can imply a divine sanction or not.[120] In this study, human agency plays an important element of legislative authority of judge and jurisconsult: To what extent, did *qāḍīs* and *muftīs* engage in a legislative role and in how far did they and/or Muslim legal scholarship anticipate this role? Did the *muftī* act as a guide or constraint to the judge in the adjudicative process of law-making? Was judicial consultation designed to allow the *muftī to* act as a controlling instance of a legislative *qadī* justice?

The interpretation of religious law raised important religio-legal implications. The question, for instance, whether the legal result of a practiced exegesis can be determined as right or wrong, was answered by renowned judge al-ʿAnbarī with the famous saying: "*Kullu mujtahid muṣīb"* ("All scholars who exert their independent legal reasoning find the right solution", or, as van Ess translated into German, "wer Recht spricht, hat Recht"[121]). This prominent statement underlined that interpretation could only be a probalistic enterprise– and captured the focal point of the indeterminacy debate in Muslim legal scholarship.[122] This meant that even a jurist who flawlessly used proper methodology (*lege artis*) accepted that his interpretation of law (*fiqh*) might prove wrong, and a competing version might prove correct. [123] Jurists took comfort in the belief that God would not punish any Muslim for obeying, in good faith, one plausible version of *fiqh* rather than another– even if it turned out that a Muslim's chosen interpretation of law turned out to be incorrect. But while theologically speaking, the problem of indeterminacy was deferred to the next life, the question of legal

[119] Emon, "Human Legislative Authority" (2004), p. 4.
[120] On the judge's erroneous judgment as divinely sanctioned or not, or, differently put, on the conflict between judicial decision and ethic duty in the case of an erroneous judgment see Johansen, "Truth and Validity of the Qadi's Judgment" (1997), particularly pp. 9-19. For a study of early Muslim jurists' assumptions and presumptions about free will and determinism, the nature of creation, and the human capacity to make moral decisions see Zysow, *The Economy of Certainty* (1984).
[121] van Ess, *Theologie und Gesellschaft* (1992), II, p. 161, 161-165; ibid. (1993), V, p. 117-119.
[122] See Chapter Two, II.
[123] On the theological and legal theory debates of predetermination see for example van Ess, *Theologie und Gesellschaft* (1992), II, pp. 161-162. The legal statement of every jurist being right comes from the theological position of no predetermination. So those jurists who supported the theological position that there was no predetermination were also those that made particularly ample room for accepting each others interpretation of the law, and distanced themselves from assessing a judgment to be right or wrong as long as it was derived through the generally accepted methods of deriving the law.

indeterminacy became a secular, worldly matter[124], to be decided also in the course of adjudicative law-making.

Muslim jurists were aware that there was much space for discretion on the part of the implementer of the law, consciously or not. Therefore, recognizing the relevance of human agency and the socio-legal factors accompanying the application and making of the law does not conflict with the religious provenance of the law.[125] However, it made some jurists of the formative period particularly nervous about whether the judge was engaging in judicial activism, violating and substituting authoritative binding law.[126]

Islam is both a faith and a framing world view. It serves as justification and legitimization of the Islamic legal system on the one hand and as a sanctioning mechanism (in this world and the Hereafter) on the other hand. [127] This, of course, also applied to the judges and jurists. Jurists (*fuqahā'*) also engaged in theological debates, and their understanding of theology also informed their legal positions.[128] Legal counsel by a *muftī* can have both a religious and legal meaning, and the product of his legal engagement, *in concreto* the *fatwā*, represents a level of the law in which legal and religious aspects often were differentiated.[129] While a *fatwā* could answer theological and legal questions, a *fatwā* addressed at a judge would always deal with justiciable questions. Thus, issuing a *fatwā* for a judicial addressee must be considered a legal activity.

Surely, where law and religion are bound to text, scriptural authority becomes decisive. The question of legal authority, to a certain extent, was therefore also a question of exegetical, religious authority. But adjudication was not a sacred act or and judgments as reproduced in narrative materials contained no ritual formulae (which could be assumed

[124] Jackson, *Islamic Law and State* (1996), p. 182-183.
[125] Stilt, "Price Setting" (2008), p. 58.
[126] See Shafi'ī's ideas about judicial consultation as a way to restrain judicial activism, Chapter Two, V. 2. a. bb. and Chapter Two, V. 2.b.bb.
[127] Schneider, *Das Bild des Richters* (1990), p. 201.
[128] *Van Ess* has illustrated that jurists often joined, sometimes even led debates on theological questions, and that theological debates informed the legal positions jurist took Van Ess, *Theologie und Gesellschaft* (1992), II, pp. 121-122, pp.144-164 on judges and jurists participating in theological disputes.
[129] Johansen, "Genres of Legal Literature", *Encyclopedia of Legal History* (2009), III, p. 321. One of the most distinguished attempts to differentiate between legal and non-legal concerns in Islamic law has been offered by Johansen, *Contingency in a Sacred Law* (1998). Though according to systems theory, law strives to gain and retain its autonomy to function independently of other social institutions and systems such as religion, polity and economy, it remains historically and functionally linked to these other institutions. See Luhmann, *Ausdifferenzierung des Rechts* (1981), p. 173.

given adjudication (*qaḍā*) as, also, a religious duty). The word "*qāḍī*" does not appear in the Qur'ān in a specific judicial context, yet in terms of taking a final decision. Neither do early legal writings base their elaborations on an in-depth analysis of the Qur'ān. [130] Also, importantly, it will be seen that religiously expressed arguments were barely made in creating authority of judge and jurisconsult vis-à-vis each other. Much rather it was arguments regarding substance and method of law, as well as the economic and social order of law.[131]

It is hard to say how much their legal arguments were affected by the knowledge that they, too, were subjects of a (higher) judgment. An anecdotal example shows that at least some must have had this in mind: the Abbasid judge ʿAmr b. Sālem wore a ring in which was engraved "ʿAmr b. Sālem fears that if he disobeys God he awaits punishment in the Hereafter".[132]

The interest to look beyond the text for insights in the law is not new. Scholar of Islamic law and philosophy *Anver Emon* re-assesses the importance of human agency and authority and concludes:

"But what these debates force us to consider, and which is not well reflected in the current state of Islamic legal research, is that if we take seriously the role of the human agent in the construction of the law, and abandon the myth of the mere discovery of the law, we must alter the very nature of legal authority, we must alter the claims for a pure and pristinely objective "law of God", and we must recognize that the laws espoused in books of medieval *fiqh* [jurisprudence] and contemporary legislative codes in the Muslim world are not only the product of human interpretation, but are vulnerable to the frailties associated with the human condition and the contingencies of history. What we consider as Islamic, then, extends beyond the text, and is subject to constant review, revision, and change." [133]

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[130] Gräf has argued that the absence of an extensive analysis of the Qur'ān for early legal writings might have two reasons: One, that it was difficult to refer legal disputes and their solutions back to concrete verses of the Qur'an (or ḥadīth), and two, that the extent to which the verses revealed to the Prophet also bind other Muslims has been debated, see also Gräf, "Gerichtsverfassung" (1955), p. 64.

[131] See the argumentation exchanged between judges and jurisconsults over diverging opinions in adjudication, Chapter Three.

[132] Wakīʿ, *Akhbār al-quḍāt*, II, p. 307.

[133] Emon, "Human Legislative Authority" (2004), p. 12.

A. Emon encourages increased efforts to allow contemporary philosophical debates to address Islamic questions, so that "we may find a paradigm of authority that preserves the sanctity of Islamic law while making room for the contingencies of human experience".[134]

d. Authority Under Legal Uncertainty

Central to my work is the question of how legal authorities engage in adjudicative rulemaking under conditions of indeterminacy. It is above all in situations of such uncertainty that a judge will consult a jurist and request an opinion on a matter of law. Theories and conceptions of both judicial decision-making as well as of indeterminacy in law therefore play a major role in this work. Authority of legal personae is therefore clearly linked to legal theory.

Debates about the scope of reasoning when no authoritative legal source is at hand prominently arose both in the contexts of German, US-American as well as Islamic legal scholarship. I will thus employ a legal theory approach that benefits from similar questions and concerns regarding authority in the face of uncertainty in both legal systems – obvious differences notwithstanding.

Instructive is the renowned 19th century dispute between the German legal schools of the positivist *Begriffsjurisprudenz* and the *Freirechtsschule* which heightened the consciousness for the gaps of the law, and the argument of filling them not in a positivist manner through concepts (*Begriffe*) but free, i.e. not totally unbound but in orientation to real life and social realities. These debates took the judge as a central legal figure in interpreting, or for the latter, making the law. For the school of *Begriffsjurisprudenz* (prominently represented by *Puchta*, the early *von Jhering*, who continued the legal ideas of *Savigny*) the law was complete and was the binding force for the judge.[135] The prevailing school of thought of that time had limited the tools of interpretation to grammar and logic and had been bound to the judicial syllogism. That doctrine seeks to reduce judicial activity to the linkage of the general premise (statute) and specific premise (case) and views judgements as a mechanical-logical consequence of such

[134] Emon, "Human Legislative Authority" (2004), p. 12.

[135] Puchta, *Pandecten* (1838); von Jhering, Geist des römischen Rechts, 1852-1865, idem, *Der Zweck im Recht* (1877/1883); Savigny*, Vom Beruf unserer Zeit für die Gesetzgebung und Rechtswissenschaft* (1814). See also Haferkamp , *Georg Friedrich Puchta und die 'Begriffsjurisprudenz'* (2004); Ogorek, *Richterkönig oder Subsumtionsautomat? (*1986), pp. 273-278.

formal procedure.[136] The doctrine of legal interpretation eventually marginalised judicial activity and authority by creating the dogma of completeness of the legal system and deriving from that the view that every judicial decision is provided for and, if the correct procedure followed, can be easily determined.[137] But the idea of a mechanical application of the law by means of strict logical operation of case-law started to show cracks.[138] Within the doctrines of interpretation, this had found its collapse in so-called objective interpretation, which restricted the judge in his far-reaching discussion through the discovery of the teleology of law. The jurists of the German schools of free law (*Freirechtsschule[139])* and their famous representatives *Kantorowicz*, *Ehrlich* and *Sinzheimer* and, later, the jurisprudence of interests (*Interessensjurisprudenz)* paved the way for the inevitable and revolutionary conviction that neither the legislator nor the legal system could draft law for all eventualities and that it must rather be understood as a constantly changing product of social reality.[140] The judge needed to fill the gaps with respect to social reality, the personality of the judge is therefore highly significant.[141]

The German debate left its marked on the US-American legal scholarship.[142] The uncertainty, or indeterminacy debate was picked up, and *Roscoe Pound* prominently raised the key question of extra-textual filling of gaps and ambiguities left by the text.[143] Some US-American discussions of judicial decision making and indeterminacy in legal theory explore the potential constraints on judicial discretion supplied by precedent, text, and history, others focus on interpretive theories, or highlight the judge's individual policy preferences or social background, and yet others regard the court and its judges as operating strategically in a complex institutional setting that can influence outcomes. [144]

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[136] Ogorek, *Richterkönig oder Subsumtionsautomat?* (2008), p. 6. Ogorek, "Inconsistencies and Consistencies in 19th-Century Legal Theory" (2008), p. 161.
[137] Kaufmann, *Gerechtigkeitswissenschaft* (1965), pp. 8-10. Ogorek, "Inconsistencies and Consistencies in 19th-Century Legal Theory" (2008), p. 162.
[138] For socio-economic reasons as related to these legal debates, see Ogorek, "Inconsistencies and Consistencies in 19th-Century Legal Theory" (2008), p. 162.
[139] Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft* (1903); Sinzheimer, *Die soziologische Methode in der Privatrechtswissenschaft* (1909). On the *Freirechtsschule* and the judiciary, see also the writings of Oskar Bülow as an early predecessor, Ogorek, *Richterkönig oder Subsumtionsautomat?* (2008), p.257-269. Further on the contribution of the Freirechtsschule for the field of legal sociology, Rottleuthner "Drei Rechtssoziologen: Eugen Ehrlich, Hugo Sinzheimer, Max Weber" (1986), pp. 227-252.
[140] Ogorek, *Richterkönig oder Subsumtionsautomat?* (2008), pp. 257-269.
[141] Kantorowicz [Gnaeus Flavius], *Der Kampf um die Rechtswissenschaft* (2002), p.. 37.
[142] On traveling people and ideas between *Freirechtsschule* and *Legal Realists*, see above and Baer, Rechtssoziologie (2011), p. 145.
[143] Pound, "The Call for A Realist Jurisprudence" (1931).
[144] On approaches by scholars of law and political sciences on judicial decision making Ruger/Kim/Martin/Quinn, "The Supreme Court Forecasting Project" (2004), p. 1152. Generally speaking,

All are concerned with one question: How do judges reach their decisions? Generally speaking, there are two main takes. The school of analytical jurisprudence suggests that the rule of law is the key determinant.[145] This legalism centers around the assumption that judicial decision-making is based on legal doctrine as the primary determinant of extant case outcomes. Accordingly, judges are considered constrained decision makers as their verdicts will be based on precedent and legal rules.

For the schools of Legal Realism and Critical Legal Studies, on the other hand, legal materials are central, but do not completely determine the outcome of legal disputes. The law may well impose many significant constraints on judges in the form of substantive rules, but eventually this may often not be enough to bind or guide them to come to a particular decision in a given particular case. Other factors will then become crucial: an array of political, sociological, and psychological factors play a decisive role in producing judicial outcomes. For Legal Realists, legal reasoning was not considered to adequately explain the basis of judicial decision making.[146] Followers of this sociological jurisprudence – the US-Realists of the 1930s – went so far to say that rules based on precedents were nothing more than smokescreens[147] or "myths, clung to by man out of a childish need to sureness and security. A mature jurisprudence recognizes that there is no certainty in law."[148] Differently put, extratextual factors decide what the law eventually becomes. Legal Realism and Critical Legal Studies, both commonly identified with the indeterminacy critique[149], sought to fill the void of indeterminacy with "extrajudicialism".[150]

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legal academics place more weight on doctrine, text, and legal principle in their analysis of judicial behavior, and political scientists tend to stress attitudinal and institutional explanations more heavily. Internally, both disciplines are highly heterogeneous.

[145] Austin, *Lectures on Jurisprudence* (1904) is considered an early main proponent of the school of analytical jurisprudence.

[146] Realists were criticized for not offering much beyond judges' intuitions of what the law was. See Horwitz, *The Transformation of American Law 1870-1960* (1992), especially p. 193-212, discussing and critiquing major tenets, strains, and the legacy of Legal Realism. It is a critique that was recognized by Karl Llewellyn and others. Llewellyn searched for general factors to aid in the "reckonability" (or predictability) of court behavior- factors that were not linked to the particularities of case-specific doctrine or text. See Llewellyn, "The Common Law Tradition: Deciding Appeals" (1960), pp.17-18, 223, 335-336 and idem., "On the Good, the True, the Beautiful, in Law" (1942), p. 243-246. Ruger/Kim/Martin/Quinn, "The Supreme Court Forecasting Project" (2004), p. 1156.

[147] See Frank, *Law and the Modern Mind* (1930), Llwellyn, *The Bramble Bush* (1951).

[148] Stumpf, *American Judicial Politics* (1988), p. 16.

[149] On the joint and different stances of Legal Realism and Critical Legal Studies on aspects of indeterminacy, Leiter "American Legal Realism" (2006), p. 65: "CLS writers went beyond Realism in two important respects: First, unlike the Realists, many CLS writers claimed that the law as "globally" indeterminate, that is, indeterminate in all cases (not just those that reached the stage of appellate review as legal realists would have it). Second, unlike the Realists, CLS writers generally grounded the claim of legal

The proponents of the Critical Legal Studies (CLS) movement pointed to the fact that legal theories and purported methods of interpretation all too often provide inadequate explanations for the actual content of legal doctrines and fail, furthermore, to supply the real reasons for their acceptance within the legal community at large. CLS thinkers reject the idea that legal doctrines can determine the outcome of as case.[151] This understanding, though it remained highly contested in several ways[152], left a pervasive impact on contemporary legal thought by widening the field of judicial law-making and by undermining the classical notion of law as a set of static, natural, and apolitical rules that could be mechanically discerned and applied by judges.[153]

Because of indeterminacy in law, judges play, willingly or unwillingly, some part in the making of law. [154] The indeterminacy thesis argues that nothing is law until it has been promulgated by an official - either a judge or any legislative authority. It becomes law only if a legitimate authority declares so.

The German and US-American critique against the "the dogma of the binding force of the law" engaged in "debunking the 'myth of certainty'"[155] and is relevant for this work in a valuable way: In criticizing the "classic" understanding of the legal process, called legal formalism or textualism, the debate bears some structural resemblance to the rational vs traditional textualist theories of Islamic legal interpretation.[156] Analogous trajectories of indeterminacy and extra-textual, extrajudicial conceptions have thus also long marked the Islamic legal tradition.

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indeterminacy not in the indeterminacy of methods of interpreting legal sources, but rather in the indeterminacy of all language itself".

[150] Pound, "The Call for A Realist Jurisprudence" (1931), p. 705.

[151] Or, as legal realist Holmes has put it: "General propositions do not decide concrete cases", Lochner vs New York (1905), 198 US, 45, 78.

[152] Ruger/Kim/Martin/Quinn, "The Supreme Court Forecasting Project" (2004), p. 1155. In the 1990s the indeterminacy thesis came under heavy attack by defenders of the rule of law, such as Hart and Dworkin. The thesis can be criticized because the concept of legal mistake is recognized in a determinative theory of law. Accordingly, while such a mistake necessarily involves a normative judgment, it is not truly subjective. A positivist Hartian theory states that this judgment is conventionally objective because the rule of recognition fails to recognize the mistake as legally valid. According to a liberal theory such as Dworkin's, the normativity of the judgment is one of reason rather than of value. See, for instance, Leiter, "Legal Realism and Legal Positivism Reconsidered" (2001), pp. 278-301.

[153] A paradigmatic expression of this ideal is Christopher Columbus Langdell's claim that "law is a science, and that all the available materials of that science are contained in printed books". Langdell, "Harvard Celebration Speeches" (1887), p. 124.

[154] Holmes, "The Path of the Law" (1897), p. 461.

[155] Kennedy, *Critique of Adjudication* (1997), p. 88.

[156] On the rational vs. traditional approaches to law in the formative period, see Chapter Two II. 3. On comparable structural parallels in the schools of Legal Realism/ CLS vs. legal formalism and textualism, and the rationalists vs traditional approaches in Islamic legal thought, see also see Rabb, *Doubt's Benefit* (2009), p. 3-4, 6; Stilt "Price Setting" (2008) p.58-59.

In Islamic legal theory, from very early on, debates about certainty and probability also affected adjudicators determining the rules of law necessary for the termination of a case. From a very early period, epistemology was central for the question of legitimacy and authority. Certainty and probability were the fundamental categories within their theory of law (*uṣūl al fiqh*) with which they approached every question of law.[157] Early Muslim scholars' constant emphasis on epistemology makes Islamic law self-conscious towards how to derive the rules of its legal system and who should be entitled, legitimatized and in authority to do so. [158]

Muslim jurists from early on have engaged in a debate about the limits of certainty in law, and the validity and scope of probability in law-making. Indeterminacy in law was an acknowledged phenomenon that was reflected in many legal genres of the early law.[159] The genre of *ikhtilāf* (disagreement amongst jurists), for instance, begins by recognising indeterminacy of law and the resulting diversity as a natural phenomenon grounded in the teachings of the Qur'ān. Muslim jurists emphasise diversity as a divine blessing because humans differ in their levels of understanding and social settings. Two approaches to explaining the differences, at least, are common: One approach seeks to explain the basis of the difference with reference to diverse local usages in language, customs and different levels of knowledge of the *ḥadīth*. The other approach tries to identify the different methods adopted by the jurists or by the schools in their legal reasoning.[160] Either way, Muslim jurists were conscious that the scope of possible interpretations is both restricted because of the sacred origin of Islamic law, yet also allows for a wide spectrum of interpretive possibilities within the confines of binding sacred law.[161]

How did Muslim jurists envisage that judges should reach their decisions under conditions of uncertainty – and how did they in fact reach their decisions? The range of possible interpretations, however, needs to be backed "with some recognizable form of

[157] Zysow, *The Economy of Certainty* (1984), p. 1.
[158] Zysow, *The Economy of Certainty* (1984), p. 1.
[159] While the early *ikhtilāf* books are mostly collections of differing opinions by the jurists, later works gradually intensify theories to explain these differences. For the continuous interest of Muslim jurists in the subject of indeterminancy in the *ikhtilāf al-fuqahā'* literature and its implications for today, see Masud, "Ikhtilāf al-Fuqahā': Diversity in Fiqh as a Social Construction" (2009), p. 71. While the early *ikhtilāf* books are mostly collections of differing opinions by the jurists, later works gradually intensify theories to explain these differences.
[160] Masud, "Ikhtilaf al-Fuqaha: Diversity in Fiqh as a Social Construction" (2009), p. 71.
[161] Hallaq, "Uṣūl al-Fiqh: Beyond Tradition" (1992), p. 178.

authority",[162] such as the power of precedent, the force of custom or the views of the ruling class – or by scholarly authority. Both in the normative and empirical literature, uncertainty of law was addressed by first, strengthening the autonomy of the judge to be conscious about his legal reasoning, and second to have the jurisconsult participate in adjudication – as guide or as control, depending on the school of legal thought, and depending on individual case settings.

Uncertainty in law also makes room for judicial activism, i.e. judges engaged in law-making.

The normative debate on judges legislating is highlighted by Muslim jurist Shāfiʿī's (d. 820) fear of violating or substituting authoritative texts through legislating in adjudication[163], the fear of judicial activism, i.e. substituting reasoning for revelation had been made.

For *Duncan Kennedy*, judicial activism (in private law) refers to the willingness to change or evolve the law in ways that upset existing patterns of economic and social advantage.[164] This definition becomes crucial for this study. Significantly, this work will show how empirical disputes between Muslim judges and jurisconsults adhering to different schools of legal thought became indeed decisive over property rights and patterns of social orderings.[165]

In referring to concepts like judicial activism or risk distribution, predominantly German and US-American theories, concepts and legal reasoning techniques of the nineteenth and twentieth century are applied to 9th century Islamic law. Surely, there is the risk of committing historical and/ or theoretical anachronisms, and running the danger of taking concepts out of context, dismembering them from the original intent, and adopting a conceptualism that has rightly been much criticized.[166] This is particularly so given that modes of arguments and analysis have always been linked to specific or larger interests and positions.[167] This danger can only be addressed by an acute awareness of the

[162] Jackson, *Islamic Law and the State* (1996), p. xxv.
[163] See Chapter Two VI. 2. a. bb. (1.), Chapter Two VI. 2.b.bb.
[164] Kennedy, "Toward an Historical Understanding of Legal Consciousness" (1980) p. 5.
[165] See Chapter Three I. 2. a.bb., Chapter Three I. 2.a.ii.
[166] On difficulties of adopting American Legal Thought on to other systems of legal thought, Kennedy, *The Canon* (2006), p. 244.
[167] Legal Realism and Critical Legal studies come with their own baggage of their milieus, developed against the backdrop of Protestant ethics, New Deal policies or East Coast Libertarianism.For how modes of arguments and analysis were linked to specific political interests and positions in the US-context of

political, social and economic embeddedness of theories as well as a cautious navigation and use of them that pays respect to the features of another time and place.
This broadly comparative approach allows to fit in an evaluation and reconstruction of Islamic legal history into contemporary theories, using concepts to elucidate and re-construct the law. It may make the field of Islamic legal studies approachable and accessible for concepts and theories of the present.[168] Furthermore, failure to consider the applicability of Islamic law to methods from other fields of legal studies leads to the unsustainable assumption that Islamic law is exceptional and cannot be studied in a comparative manner.[169] Instead, wherever comparative aspects might aid to highlight a particular aspect of legal authority, they will be employed, amended where thought necessary, and thus tested for their (partial) applicability.

This theoretical convergence will indeed not surprise the scholars of Islamic law, given that Islamic legal theory prominently developed against the backdrop of legal questions of certainty and probability in Islamic law. For all legal systems it is important to note that legal reasoning can indeed produce closure (i.e. constraint by the text), and that the "experience of boundness" is not a "mere illusion".[170] But the law has gaps, ambiguities and conflicts and that "one cannot say with certainty that when closure occurs it is a product of a property of a field rather than a work strategy adopted under particular constraints".[171] Leading questions for this work are thus: In light of uncertainty, what are the origin of rules that claim to bind Muslims before the court? What is the source of their validity? Who is entitled to generate normativity, to make authoritative pronouncements on what the law is? What are the criteria for resolving disagreements as to the law, and who establishes these?
Theories and concepts of law as presented here, will lay the ground for the following questions, addressed particularly in Chapter Two: Did uncertainty in the judicial decision-making process widen the door for extrajudicial expertocracy? Did it allow for judicial activism, and if so, how were the reactions of jurisconsults on judicial activism? Was there a joint judge-jurisconsult law-making, in the sense of a consensual or

political ideas and legal thought, see Kennedy/Fisher, *The Canon* (2006), p. 15.The Islamic contexts of political and legal thought will be dealt with in the course of this work.
[168] I am aware, though, of the asymmetrical relation between the dominant mode of thought, US-American, that is drawn upon to analyze "the other", Islamic, mode of legal thought.
[169] Stilt, "Price Setting" (2008), p. 59.
[170] Kennedy, "Judicial Ideology" (1996), p. 798, 801.
[171] Kennedy, "Judicial Ideology" (1996), p. 798.

conflictual process? Was there a risk-distribution, each sharing the risk of making the "wrong" decision? Under uncertainty, how did the judge deal with the burden of decision making? And was the role of the *muftī* to possibly share this burden, leading to a joint risk-distribution? In cases of indeterminacy of law, who is the "marker of the law"[172], or the maker of the law?

In efforts towards resolution, an understanding of law that makes space for uncertainty and indeterminacy, risk-taking and deliberation of reasons in law-making is central. Muslim jurists anticipated that extra-textual reasoning is necessary for the purpose of establishing a legal and judicial system.[173] In this work, I would like to show that Muslim legal realists not only took into account standardized extra-textual considerations for interpreting the law but also were acutely aware of the question of who should have the authority to do so.

e. Authority Through Organization

This study also highlights of how and to what extent organization creates authority at the meso-level.[174] Legal theorists *Hart* and *Sacks* captured the link of socio-legal action within organizations and institutions in the following way: "No social question can be intelligently studied without a sensitive regard to the distinctive character of the institutional system within which the particular question arises." [175] The organizational architecture of a legal profession can enhance or limit the authority of legal personae vis-à-vis each other.[176] Organizational reforms of the Abbasids such as the judge's direct appointment by the caliph (in departure from previous appointment from local governors) and the rise of the scholars and the growing consolidation of the schools of law affected their authority, so that these reforms especially in the fields of judicial centralization, professionalization, and bureaucratization need to be taken into

[172] Van Caenegem, *Judges, Legislators, and Professors* (1987), on the changing preponderance of professor-made law, judge-made law and legislation.
[173] Emon, "Human Legislative Authority" (2004), p. 12.
[174] On distinguishing the levels of *micro* (agents, their actions and interactions), *macro* (structures, processes, systems, patterns) and intermediate *meso* level (organizations, institutions), Rehbinder, *Rechtssoziologie* (2009) pp. 45-60; On applying these three levels for legal research, Baer, *Rechtssoziologie* (2011), pp. 260-265.
[175] Hart/Sacks, "The Legal Process" (2006), p. 259.
[176] Judicial organizational aspects can also be read as questions of governance, comprising collective regulations and interactions of institutions and self-regulatory organisations, state and private actors, and top-down state actions, see for instance, Mayntz, *Soziologie der öffentlichen Verwaltung* (1997), p. 72. More recently on the role of (constitutional) courts and governance, Schuppert, *Governance und Rechtsetzung*, (2011), pp. 49-56.

consideration as an element of creating authority. For instance, both judges and legal scholars underwent professionalization as an organizational process. Their respective professions emerged as occupations that each conferred on them not only social esteem, but also privileges and prestige, and thereby authority. Their knowledge and skills were commonly held to entitle them to exercise authority over others, even over social or political superiors. Professional prestige, in turn, rests upon the mastery of knowledge and skills unknown and unavailable to non-professionals.[177] In this study, however, we are concerned with the debating and creating of authority of two professional groups equipped with legal knowledge that need to negotiate the internal normative orderings of various groups, such as judges and jurisconsults. The study thus also aims to highlight the necessity to interact with each other, as members of groups, interested in guarding or enlarging their spheres of authority.

As a professional class of judges as well as jurists determined or at least partook in determining the norms of a society, it became necessary to examine the legitimacy of this power position. This is the reason why legal personae as a professional group, and not only the law should form a significant object of legal, sociological and historical research.[178]

The interest in authority of legal personae is an interest in how legal authorities shape the law and how they dispense justice. It is in this sense that the study will contribute to ongoing socio-legal debates on authority of legal personae and the way adjudication and the legal body are organized. In fact, the understanding of the legal profession seems indispensable to the sociological study of the law. [179] In various ways, legal personae shape the substance of the legal order rather than merely apply it. The ideal of a "rule of law, not of men" was not attainable, as we know from the arguments of legal realism[180], and more generally from the many debates over the methodology of law and legal theory.[181]

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[177] See Brundage, "The Rise of Professional Canonists" (1995), p. 27.

[178] See for example, Horn, "Soziale Stellung und Funktion der Berufsjuristen" (1978), Dilcher, "Der deutsche Juristenstand" (1997), p. 163, Ranieri, "Vom Stand zum Beruf" (1995), Rüschemeyer,"The Legal Profession" (1977). Contemporary scholarship on the authority of legal personae focuses on particular personal-bound criteria such as class, gender, race and ethnicity, religion, age. These criteria are relevant also in that authority is derived from power based on structural inequalities in societies.

[179] Rueschemeyer, "The Legal Profession" (1977), p. 97.

[180] Rueschemeyer, "The Legal Profession" (1977), p. 97.

[181] Dilcher, "Der deutsche Juristenstand" (1997), p. 163. See also Grimm, "Methode als Machtfaktor" (1987).

3. The Setting: Geographies of Law in a Formative Period

The period under study, the early Abbasid period from 132/750-247/883-4, saw the emergence of a centralized, professionalized and bureaucratized judicial system as well as the rising production of the methodological study of law by scholars of law in what later came to be known as schools of law. Both developments lead to a rise of two elite personae that had to guard their authority vis-à-vis each other, despite the fact that they largely emerged from one and the same social and educational group. Significantly, this period did not establish evidence of formal regulations of legal authorities vis-à-vis each other. Neither rulers, nor officials nor recognized bodies of scholars determined a legal hierarchy that Muslims must accept - other than the worldly primacy of the caliph. The formative period is also relevant in that right after the death of the Prophet Muḥammad, who had acted as the primary interpreter of the text of revelation, the Muslim community debated how best to acquire an understanding of the Sharīʿa and how to develop a body of law for the Muslim community. Whose prerogative should the interpretation of Islamic law be? The formative period was one in which this question was particularly heavily debated.

a. Periodization of Law: The Early Abbasid Period

The Abbasid caliphate's self-image was a driving force for the major innovations and reforms affecting legal personae, be they in the judiciary or the scholarly field: After their successful revolution taking over power from the Umayyads in 132/750, the Abbasids needed to live up to their promise that, unlike their predecessors, they are an Empire that serves justice. The Abbasid revolution had drawn mass support from the idea that rule by the house of the Prophet would bring true Islam and the end of injustice and oppression. Thus legitimacy and authority of the Abbasids was closely connected to a just and respected judiciary to which they have paid much attention.

There is much discussion and debate about the appropriate periodisation of various phases in Islamic legal history.[182] Though dividing and labelling history into periods

[182] J. Schacht's history of Islamic law left a lasting mark on periodization, though the accompanying narrative has meanwhile been given much more nuances in some cases, or opposedly different bents in other cases. He divides Islamic legal history in formative (7-9th century C.E.), classical (9-10th century C.E.) and conformist (10-18th century), Schacht, *An Introduction to Islamic Law* (1964), p. 15-75. The formative period, so Schacht, lasted from the death of the Prophet in 632 C.E. to the middle of the ninth

remains a tricky undertaking, it may well be argued to identify the period from the death of the Prophet in 632 C.E. towards the middle of the ninth century as formative as Muslims came to settle main points on the sources and methodology of Islamic law.
Politically speaking, the coming of the Abbasid reign marked a decisive political break with the Umayyad past and both contemporaries and later writers saw it as a new beginning[183], especially with reference to the politics of administering justice in the Empire on the one hand, and fostering good relations with Islamic legal scholars to boost Abbasid legitimacy. The first two centuries of Abbasid rule were characterized by a relative political continuity as represented by the caliphate as the sole source of worldly authority. Having said this, recurrent uprisings, civil wars as well as the influence by sectarian[184] and military parties frequently tested the stability and unity of the Empire.[185]

The period in question is formative also with regard to administrative rules and regulations. Iraq, the central land of the Abbasid caliphate, was the laboratory for two systems that were central for the history of governance in Islam. The caliphate in its revitalized form meant that administrative reforms of the first Abbasids allowed a strengthening of central power, both political and judicial. By extension this meant a centralization, professionalization and bureaucratization of the judiciary, imbued with imperial state authority delegated by the caliph himself. Concurrently, during these two centuries, Islamic law took the "classical" form which continued to act as reference later: The four great eponyms of Islamic law, Abu Ḥanifa, Mālik b. Anas, Shāfiʿī and Aḥmad b. Hanbal, all practised during this time. Distinct schools of law (*madhhabs*) were gradually formed, in which some jurists lay the written foundations for Islamic normativity. Although the fluid nature of substantive doctrines associated with the earliest schools has given occasion to studies on whether the assembly of divergent

century. During this period, Muslim came to settle main points on the sources and methodology of Islamic law. To label this period “formative” is not to deny that Muslim scholarly thought maintained to evolve in important ways after it.

[183] Kennedy, *The Early Abbasid Caliphate* (1981), p. 16.

[184] Shortly after the Abbasid revolution, Shīʿite doctrines of the rightful leadership (imamate) which has been the basis of Shīʿite thought ever since, were elaborated and found a substantial following. Kennedy, *The Early Abbasid Caliphate* (1981), p. 16.

[185] The making of the Abbasid Empire plays a role. Obviously, the Abbasid reign was anything but static throughout its five hundred years, until the Mongols sacked Baghdad in 1258. Even the early Abbasid period is marked by periods of transitions after change of dynasty, civil war, or rebellions and Abbasid reign remained regularly contested by its opposition. Though this dynamism cannot be captured throughout this work it is the stage on which Abbasid affairs take place.

views deserves the label "school", or "Ḥanafī school", for instance.[186] This commendable call for a more nuanced and cautious use of demarcation lines does not exclude the fact that the law, the law-making agents and their struggle for what the law should be, was already taking place in full force. This is also why the period saw the rise of decentralized scholars of Islam (*ulamā')* as a visible and increasingly influential religio-legal elite who left their imprints both on judges as well as on caliphs. At this crossroads of the political and legal domains, judicial institutions as well as legal scholarship had to define themselves vis-à-vis each other, as the ruler largely left it to the legal personae to arrange their relationship of authority in a self-regulatory system, while both judges and jurists effected the daily application and understanding of legal norms. This is the formative period when Islamic law became an academic object of debate[187], and of scholarly disagreement. The importance of this period for the question lie in the nascent legal schools[188], allowing for leeway in legal interpretation that lead to an effective normative pluralism as debated and applied at this time. This is the central period of any account of Islamic law, before legal orthodoxy and judicial practice were considered consolidated[189], before thick layers of tradition imposed themselves on the scholarly and judicial course.

In contrast to succeeding periods of Islamic legal history, this period sticks out because rulers did not place limits on jurisdiction by exclusively choosing judges from one of the many law schools only (as done later on by the Ottomans around the 14th century). Nor did rulers appoint an official state *muftī* to whom judges were required to refer in legal questions (as installed by the Ottomans). The Ottomans chose both judges and official *muftīs* from the Ḥanafī school only and thus ensured that the overwhelming majority of jurists followed one legal understanding only. Normative pluralism, external and internal to the school of law, was strongly limited in comparison to earlier times, such as the Abbasids.

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[186] See Tsafrir, *The History* (2004), p. xi, In recognition of the divergent elements and the lack of full information about the doctrines of the time, she opts to call those associated with 2nd/8th Ḥanafism the "Ḥanafī circle" rather than "Ḥanafī school," which was not sharpened until the 3rd/9th century as marked by their participation in implementing the trials about the Createdness of the Qurʾān (*miḥna*) and fully in the 4th/10th century by the elaboration of legal theory (*uṣūl al-fiqh*). Ibid., p. xii-xiii.

[187] Hallaq, "Juristic Authority vs. State Power" (2003-2004), p. 252.

[188] The problem of categorizing second and third-century jurists and their texts as belonging to a distinct school therefore runs through the entire work, and is particularly discussed in Chapter Four, III 1.a.

[189] Tillier, *Les Cadis* (2009), p. 22.

Even earlier, in the classical period starting around the 11th century, the conviction started to emerge that judges no longer mastered the tools of original legal reasoning on the basis of the revealed texts (*ijtihād*) and that thus judges should be required to follow the views of renowned representatives of their respective school of law. The judge was thus considered a legal conformist (*muqallid*), not qualified to exert independent legal reasoning anymore.[190] This was a way to shape and strengthen an inner-school consensus (ijmāʿ) and have judges and jurists follow the opinion that prevailed in the juristic consensus-making process, all geared towards consolidating the school's understanding of the law.[191]

The Abbasid period therefore displays a variety of distinct features that raise issues of great relevance to this work's intellectual pursuit: How was authority of law debated in the formative period, the period still unbound by canon and consensus (*ijmāʿ*)? How was authority created when rigorously following the law school, legal conformism (*taqlīd*), was not yet and not alone a compelling argument to apply the respective school's law? How was authority constructed before scholars could and had to reference their legal opinion by a long tradition of prominent jurists of their respective schools of law? This is the period before the school of law became defined by a professed allegiance to the doctrines of its eponym and a core of legal texts that functioned as a curriculum.[192] This is the formative period: When the question what the law was, was a particularly dynamic one.

The marking point is thus not one that is related to a change in the course of the Empire, but rather one that shows a change in the question of authority, in the relation between

[190] Later *adab al-qāḍī* works recommended the judge to follow the views of renowned representatives of his school of law. Accordingly, the Shāfiʿī jurist Ibn Abi Dam (d. 583/1187), for instance offered his readers and listeners, judges or judicial candidates, the legal opinions of the great legal Shāfiʿī minds in a concise compilation. Ibn Abī Dam often gives an overview of the different positions of various scholars and then the dominant opinion in the school of law, i.e. the opinion that prevailed in the juristic consensus-making process, or his own preference- all geared towards consolidating the school's understanding of the law. On the recommendations of Ibn Abī Dam's Etiquette of Judge treatise *adab al-qaḍā'*, see Schneider, *Das Bild des Richters* (1990), p. 146. Similarly, eminent Andalusian jurist Ibn Rushd [Averroes] (d. 642/1244) adhering to the Mālikī school considered judges largely to be imitators (*muqallids*). Ibn Rushd largely built his typology of jurists and the *qāḍī-muftī* relationship on the distinction between *mujtahid* (qualified to exert independent legal reasoning) and *muqallid* (imitator). Muḥammad b.Aḥmad Ibn Rushd, *Fatāwa Ibn Rushd*, ed. Al-Mukhtār b. Ṭāhir al-Talīlī, 3 vols., Beirut, Dār al-Gharb al-Islāmī, 1978, III, 1494-1504; Hallaq, *Authority* (2001), p. 2.

[191] For a detailed study of Ibn Abi Dam's *Adab al-qāḍā* , see Schneider, *Das Bild des Richters* (1990) p. 146-152.

[192] Lowry, "Shāfiʿī" (2010), p. 236.

judge and jurisconsult. For the purposes of this work, this is why the year 883/4 marks the end of the early Abbasid period. This is when the title of the judge becomes honorary, and was emptied of a large part of its competences and activities, and was not automatically related to the function of adjudicating anymore. This can be exemplified by the new composition of the judiciary in the Iraqi cities of Basra, Kufa and Wasit: Those officially carrying the *qāḍi* title in these three cities did not actually practice in their jurisdiction or even had set foot there. The *qāḍī* of Basra for instance, did not live there but in Baghdad and appointed delegates to Basra.[193] On the ground, justice was dispensed by vice-judges (*khalīfas*), delegates of the official *qāḍī*. The *qāḍīs* of Basra (and of other cities) were no longer chosen because of their specific legal background but rather because they were men of power at court.[194] The choice of *qāḍīs* became a reflection of the political strategies of the central power that were increasingly influenced by the powerful circles of secretaries and military.[195] The influence of local legal scholars in the appointment of judges also was significantly reduced.[196] From this time onwards, we do not know much about these local judges or vice-judges, and maybe precisely because no major judicial scandals were reported, it seems not far-fetched to assume that the local judges adjudicated in line with the locally dominant legal school, legal customs, and in line with the reasoning of local jurisconsults. No encounters between judge and jurisconsult thus for the later half of the third/ninth century were documented.

b. Geography of Law: Centralizing an Empire

Not only time but also space effects the development of law. In the case at hand, political geography had a profound impact on the workings of the judiciary and the establishment of the emerging schools of law.[197]

The early Abbasid caliphs ruled a vast empire, covering an area ranging from Ifriqiya (modern Tunisia and Eastern parts of Algeria)[198] in the West to the Indian subcontinent in the East, including Central Asia and the Caucasus, Persia, Mesopotamia, the Ḥijāz

[193] Tsafrir, *The History of an Islamic School of Law* (2004), p. 37.
[194] Tsafrir, *The History of an Islamic School of Law* (2004), p. 37.
[195] Tillier, *Les Cadis* (2009), pp. 124-131, 184.
[196] Tillier, *Les Cadis* (2009), p. 184.
[197] On the effect geography had on government and political life, see Kennedy, *The Early Abbasid Caliphate* (1981), p. 18-34.
[198] Kennedy, *The Early Abbasid Caliphate* (1981), p. 25.

with Mecca and Medina, the Fertile Crescent of Syria and Palestine, Egypt, and Yemen in the South. The first and last time that conquests lead to an area this vast while politically, administratively and economically united, was when it was ruled a millennium earlier by Alexander the Great – only that the Abbasid reign over this territory lasted for several hundred years longer than Alexander's brief lifetime.[199]
This territorial vastness lead to a great diversity of regional phenomena that, taken together, I call "geography of law".[200] The variety of physical geography, the make-up of the population with their local interests and the climate affecting agriculture, and thus wealth and political significance, left an impact on how the judicial system and the law developed regionally.

First, local jurisdiction of the courts were numerous, but *courts were primarily located in the urban, densely populated areas of the empire*, leaving the rest of the population to travel far distances to seek justice before court, to have judges travel to areas with scattered population to offer their adjudicational services – or to seek extrajudicial solutions to their problems by appealing to local jurisconsults either in the same city or further regions.[201]

Second, *schools of law emerged as regional schools*[202], i.e. particular schools of law were strongly associated with particular urban centers. For instance, the Ḥanafī school was associated with the Iraqi city of Kufa, and their followers were often called "the people of Kufa" or "the people of Iraq". Similarly, the Mālikī school was linked to the city of Medina in the Arab Peninsula, were its eponym Mālik b. Anas resided and its followers were called "people of Medina". The spread of the schools developed differently in the respective cities and provinces of the empire and the scholars reacted differently to the spread of one school or perceived encroachments from other schools. For instance, when the Shāfiʿī school started to spread in Egypt, it was considered as

[199] Gutas, *Greek Thought, Arabic Culture* (1998), p. 11.
[200] On law as a geographical discourse of European Empires, and how Europeans imagined distant geographies and based legal practices on their assumptions of unbound territory, see Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (2009). On geographical mapping as reinforced social and legal control, see Edney, *Mapping an Empire: The Geographical Construction of British India, 1765-1843*, 1997. Also generally on the close connection of space, cartography, empire, and rule, see Sack, *Human Territoriality: Its Theory and History*, 1986.
[201] In areas were the population was too scattered, (vice-)judges traveled around to offer adjudication, see the judges in local jurisdiction in Chapter Four, I. 3.a.aa.
[202] Hallaq, "From Regional to Personal Schools" (2001).

dangerous competitor to the Mālikī school, its teachings and rules established.[203] This "fear" was justified: When *qāḍīs* earlier on introduced the Ḥanafī school to the Iraqi city of Basra, they were not only confronted with criticism of the local legal scholars, they gradually even replaced the Basran legal tradition, not without having incorporated some of their legal ideas into their school of law though.[204] It is important to note though, that adherence to legal schools and methodologies also developed across the local setting and plurality within one city, and within one emerging school were a regular feature.[205]

Third, the empire was divided into *centre and provinces, with unequal distribution of governmental-judicial and scholarly attention*, with a focus on the centre and a few influential provinces, leaving some peripheries barely addressed.[206] This distinction into center-province-periphery affected the development, spread and acceptance of Islamic law. It lead to "provinzielle Sonderentwicklungen"[207] (particular provincial developments) through the encounter of imperial ruling with established local leadership, on questions of law just as well as on questions of government.[208] Thus while the Iraqi centre received a lot of political, scholarly attention by the contemporaries, which meant that events were well-documented, many provinces, like the former centre Syria, ceased to attract attention. One province that was treated with great interest was Egypt, given the province's agricultural wealth and importance for the Abbasid budget.[209] Egypt's judicial developments were therefore covered with much interest. [210] The relation of authority between *qāḍī* and *muftī* are thus to be studied and analyzed for Iraq and Egypt separately, and different outcomes in different places should not be surprising: Authority dynamics can be different in different circumstances.

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[203] Al-Kindi, *Kitāb al-Wulāh*, p. 438.
[204] On Basran jurisconsults' resistance to Ḥanafī *qāḍīs*, see Chapter Three I. 2.2.
[205] See Chapter Three I.2.2.
[206] On the legal tensions between centers and peripheries as a constituent of spatial and legal differentiation see the seminal work of Greene, *Peripheries and Centers* (1986).
[207] Van Ess, *Theologie und Gesellschaft* (1991), I, p. VII.
[208] "Provinzielle Sonderentwicklungen" forces you to look into each city history as closely as possible: while in some cities, legal circles were already clearly established and distinguished itself from other school argumentation (see the Iraqi city of Basra during the mid-late 2/8th century) which differed from Hanafi legal thought, Tillier, *Les Cadis* (2009), p. 176, in others, like the Iraqi city of Kufa it was difficult to name any school line that was predominately followed by the judiciary, see Tsafrir, "Semi-Ḥanafīs and Ḥanafī Biographical Sources" (1996), p. 84-85; Tsafrir, *The History of an Islamic School of Law* (2004) p. 23; Melchert, *The Formation* (1997), p. 35. Tillier, *Les Cadis* (2009), p. 176. Yet again in Egypt, it was the Māliki-Ḥanafī school divide, later the Shāfiʿī- Ḥanafī divide that caused divergence between the judiciary and the local legal scholars, see Chapter Three.
[209] On Egypt's financial importance for the Abbasids, see Kennedy, *The Early Abbasid Caliphate* (1981), p. 25.
[210] On authority dynamics in the province Egypt, see Chapter Three, I.2.b.

Fourth, the vastness of the Empire and the diverse preexisting legal-geographic architectures produced a *heterogeneous law*, effected by different law schools and adjudication considering different precedent, custom and using different criteria to qualify Prophetic tradition as norms. This geographical heterogeneity and the lack of a unified law applicable for the entire empire, was prominently lamented by caliphal secretary Ibn Muqaffaʿ in his renowned treatise Risāla fi'l Saḥāba, who had lobbied for a legal codification but whose idea was met by scholarly opposition, as analyzed in Chapter Four. The diversity is due to the fact that the geographical spread of the Abbasids, i.e. their conquests, coincided with a time when Islam and Islamic law were to be consolidated and needed to be harmonized with the pre-existing local legal structures as well as with the understandings of the legal personnel that gained increasing influence.

Fifth, the huge territory also raised the *question of control*: It was very difficult for the caliphs to exercise real authority over areas where population was too scattered and communications too difficult to allow their representatives to control the situation.[211] Among these representatives possessing extensive powers and exerting controls, the *qāḍī* was one.[212] But it also proved a challenge to control, or monitor, the *qāḍīs*, if they were miles away from the caliph who was the only one who could ask for accountability and remove the judge from office, if needed, or if requested by the jurisconsults. Such diversity and distances meant that communication was a constant problem and journeys from one part of the caliphate to another could take weeks and even months.[213] In some regions, government was patchy[214] which left judge and jurisconsult to act without close supervision of the caliph. For caliphs, on the other hand, this time-space discrepancy could become vital: decisions about provincial affairs could easily be out of date by the time they were made and revolts could gather momentum before the caliph could take action. To deal with this problem, several actors also functioned as sources of information for the caliph: Governors but also judges and jurisconsults were encouraged to report to the caliph on local ongoings, triggering a competition of authority and power

[211] Kennedy, *The Early Abbasid Caliphate* (1981), p. 18.
[212] The cities were administered by government officials, amongst which the *qāḍīs*, *muḥtasibs* (market-inspectors) and postmasters were counted, see Spuler, *The Muslim World*, (1960), I, p. 53.
[213] Kennedy, *The Early Abbasid Caliphate* (1981), p. 32-33 gives numerous examples how long the news needed to be received from and to the major cities in which the caliph (temporarily) resided. For example, when caliph Mansur died in 158/ 775 in Mecca the news reached Baghdad, a distance of about 1500 kilometers in ten days. Tabarī, *Ta'rīkh*, III, pp. 389, 456, as cited by Kennedy, *The Early Abbasid Caliphate* (1981), p. 32.
[214] Kennedy, *The Early Abbasid Caliphate* (1981), p. 18.

over each other, as Chapter Three will demonstrate. Also, an official information service, *barīd*, was established and gradually enlarged to send information to the caliph. Decisions of the *qāḍī* (and of other government officials such as the governor) were recorded and special attention was paid to local criticism of the *qāḍī*, presumably so that action could be taken in time, like the removal from office, to avoid unrest.[215]

Taken together, territorial vastness and distance brought about a rich, heteregenous tradition of understandings of Islamic law and politics. It was, at the same time, a major obstacle to the unity and government of the empire-in-the-making as it aimed to seek a certain "national" (*umma*) or religious unity. This "geography of law" posed a challenge not only to the unity, but also to the legitimacy of the empire: How diverse can justice according to God's law be? And was the question about what Islamic law was to be to be left to the judges alone or should (local) legal scholars help standardize and Islamicize the law in its formative period? Was the role of the *muftī* a means to ensure that Islamic legal standards were being applied in the courts of the Empire? Did consultation play a role in institutionalizing Islamic law at court? Did the *muftī* thus effect an Islamization of the law, and, by extension, unification of law?

Did the consultation of jurisconsults (and later the increased writing, accumulation and distribution of *fatāwa*, inside and outside of court) serve to stimulate the development of the Shari'a from below, in response to the specific needs of the Muslim communities, as prominently argued by *W. Hallaq*?[216]

The "geography of law" indicates the legal indeterminacy that lead to a multitude of different legal cultures within one Empire, despite its wrestling to unify its law. This setting also indicates another dimension to the rivalry between judge and jurisconsult: the *qāḍī*, sent out by the caliph to implement a uniform law in this vast empire, upon arrival was confronted with the entrenched local authority of a learned scholar who was much more in touch with regional legal traditions and problems and, what is more, independent of caliphal official approval. The interaction of judge and jurisconsult, against this background, therefore also appears as a negotiation of centre and province, foreign and local.

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[215] Particular attention was also paid to the price of basic commodities so that measures could be taken to prevent sharp increases and popular revolt. Tabarī, *Ta'rīkh*, III, p. 435; Kennedy, *The Early Abbasid Caliphate* (1981), p. 32.

[216] Hallaq, *Authority* (2001).

4. Scope, Disciplinary Context and Structure of this Work

This work proceeds in five steps. The present *Chapter One* has already introduced the concept of authority in its analytical versions. The following Section II presents the relevant primary sources and discusses methodological challenges.

Chapter Two analyses how Muslim jurists of the formative period debated authority. The chapter explains why the early foundational writings of the Ḥanafī and Shāfiʿī school of law on the judge's code of conduct (*adab al-qāḍī*) considered it necessary that judges and jurisconsults consult on matters of adjudication and how they thereby constructed their authority towards each other. Chapter Two shows how consultation serves to reconstruct the relationship of authority judge and jurisconsult and is of interest precisely because the writings about judicial consultation entail few, but valuable markers of authority. Consultation offers decisive indication to how their roles in interpreting and resolving disagreements on law when they occurred in court. It demonstrates that the consciousness for uncertainty was key in necessitating consultation and producing authority in Islamic legal history. It also underlines one of the key findings of this chapter, namely that consultation and authority are firmly linked to legal theory: Consultation was related to Muslim jurists' experience with gaps, conflicts and ambiguities throughout the whole of the evolving legal system, and legal reasoning (*ijtihād)* became a necessary, though variously conceptionalized, part of routine legal work. The chapter reconstructs (persuasive) authority as accepted authoritatively by two influential authors representing two competing schools of the formative period. As a result, legal uncertainty creates personal authority/ies: The higher the degree of consciousness for the indeterminacy in law, the greater the willingness to have a legal expertocracy contribute to the shaping of the law.

Chapter Three illustrates "judicial consultation in action". It demonstrates how authority of legal personae was created through encounters of judges and jurisconsults, as documented in judicial chronicles. It complements the normative debates about consultation and authority in Chapter Two by adding empirical examples of legal history, actual cases, letters of correspondence, biographical information. It shows how judges and jurisconsults shaped their authority vis-à-vis each other in different stages of adjudication, particularly with jurisconsults affecting the formation of the judiciary

(appointments and removals from office) and influencing judicial law-making before, during and after the judge's decision. The power of the persuasive argument of the expert also has its limits. This is why, as a further result, persuasive authority can also transform into quasi-coercive authority to affect change in adjudication. Quasi-coercive authority becomes particularly decisive when jurisconsults involved someone with coercive authority, the caliph to appoint or remove judges from office when advised by the jurisconsults. Reasons for the jurisconsult's affecting the judiciary were local school hegemony, economic, and social ordering of society. Chapter Three shows how jurisconsults regulated, controlled, and ordered the law not only in cooperation with the judge, but also in confrontation– testing and often succeeding in establishing their authority in superiority to the judge.

Chapter Four is an attempt to show how authority was shaped by organization, and how the fact that the judiciary was increasingly centralized, professionalized and bureaucratized gave it authority that set it apart from the authority of jurisconsults as legal scholars who largely retained their independence from the state apparatus. The emerging lines of authority were thus also shaped by both the State and the independence from it to enhance the legal figures' authority through organization. The chapter illustrates the conditions for holding effective (de facto) authority, explaining under what factual conditions legal actors obtained or held authority, and under what circumstances the (legal and non-legal) community was likely to accept the authority of some persons or institutions. It shows the distinctive characters of each group organizing their fields of authority that allowed for authority to be shaped in a particular way that was considered legitimate.

Chapter Five concludes with an assessment of the factors that went into the process of creating authority, both as a process common to many legal orders and as specificities to Islamic law. It shows how questions of legal history in general and aspects of authority in particular are continuously relevant to our understanding of legal theory and the sociology of law.

II. Challenges Arising From Source Material

What can the literature on judges and jurisconsults emanating from the formative Islamic period possibly tell us about their normative and historic encounter in their quest for

authority? What do the sources reveal about a non-quotidian encounter that was, it seems, left ambiguously unregulated, or at least not formalized by law? The exceptional nature of the encounter makes it necessary to integrate many types of source materials that yield many possible answers to a question that seeks to re-construct authority in legal history. This is so because the core primary sources entail many lacunaes that need to be explained by auxiliary sources. It will, steered by the respective primary sources entailed by thick and thin layers of arguments.

Five types of primary material will be employed for this study: (1) The advice literature for judges, or etiquette for judges (*adab al-qāḍī*), (2) judicial chronicals (*akhbār al-quḍāt*), (3) legal compendia, (4) biographical dictionaries (*ṭabaqāt*), and (5) annals of caliphal rule. Additionally, geographical literature, administrative reports and theological works were consulted where required.

Both the advice literature for judges as well as the judicial chronicles are the core material for the period under study. Though further judicial chronicles exist, like the one of Ibn Tulūn of Damascus, it does not entail information on judges encountering the authority of jurisconsults in the formative period.

The list of primary sources reveals major challenges in reconstructing the history of debating the authority of legal personae. Recourse to one main genre is not possible. Rather, a multitude of sources, all in themselves challenging, are needed to bring together the many pieces of a historic mosaic. Challenges are posed by the character of mediated sources; the largely prosopographical material; the judge-centered and Iraq-centered perspective, with a centre-province dimension not seldom at the expense of the provinces; and poetry as another highly sophisticated literary genre being used as a critical intervention. I identify five challenges in combining an analytical and historical approach to the question of authority of legal personae.

First, the typology of sources has revealed that a major challenge lays in the fact that no immediate sources are available: no preparatory materials for the judgments or judgments indicate insertions from *fatwās* requested by the judges or imposed by the jurisconsults on the judges.[217] This is noteworthy given that judges were obliged to

[217] The judgments of *qādīs* are rarely available before the sixteenth century; some fairly early judgments are reported in collections of juristic opinions (*fatwās*) in the early 16th century by *muftī* al-Wansharīsī see Powers, *Law, Society, and Culture in the Maghrib* (2002).

document and archive judicially relevant materials, including the judgments – a practice kept record of. [218] Virtually no court documents, no certificates of official appointments of judges or other registers listing recorded documents from this time have survived. All these are known to us only as reproduced narrations in literary documents, biographical or historical material. The value of such literary material is, strictly speaking, restricted because it is paraphrased, sometimes shortened, and at times with focus on a particular item of information, serving the purposes of the paraphrasing writer.[219]

Some explanations have been given to why these documents might not have survived: Legal documents needed validation through testimony.[220] Later *adab al-qāḍī* authors both insisted that only legal documents confirmed by witness statements should be considered valid and that judges should be able to recall the legal case in question.[221] A ruling on the basis of only present documents was not considered possible. [222] It may have been this procedural question on testimony that gave way to losing numerous legal documents[223], among the general historic course of misplaced and lost documents.

Similarly, we neither have *fatwās* originating from that time that indicate they were written for a judge. It should be mentioned that though this study is also about jurisconsults (*muftīs*), their textual production of legal opinions (*fatwās*) do not form an integral part of this study. This is because *fatwās*, though produced, and probably also collected and circulated from early on[224], are not existent anymore and can thus not serve as an immediate source of the formative period. Instead, some *fatwās* were reiterated, paraphrased or solely referred to in other writings, such as judicial chronicles[225] or biographical sources.[226] Though later periods contain *fatwās* that indicate that they were written at the request of a judge[227], or entail information that allow the reconstruction

[218] For example, Waki', *Akhbār al-qūḍat*, III, p. 237; Kindī, *Kitāb al-wulāt wa'l-quḍāt*, p. 310.
[219] See also Schneider, *Das Bild des Richters* (1990), p. 174-175.
[220] Wakin, *The Function of Documents* (1972), p. 1-9.
[221]See Schneider in referring here to the writings of Māwardī and Ibn Abi Dam, *Das Bild des Richters* (1990), p. 117, omitting references.
[222] See Wakin, *The Function of Documents* (1972), p. 1-15, p.12.
[223] Schneider, *Das Bild des Richters* (1990), p. 117.
[224] Motzki, "Religiöse Ratgebung" (1994), p.13.
[225] See for instance the *fatwā* of jurist Mālik to judge al-Mufaḍḍal, Al-Kindi, *Kitāb al-Wulāh*, p. 387. See Chapter Three, I.3.c and Chapter Three, I.3.d.
[226] See Motzki, *Die Anfänge der islamischen Jurisprudenz* (1991), p. 221 with references to biographical dictionaries.
[227] See for example some legal responses in the the fatwa collection of jurisconsult al-Wansharīsī (d. 1508), Powers, *Law, Society, and Culture in the Maghrib* (2002).

that they must have been written for judges[228], or at least for a legally knowledgeable addressee[229] none of this is available to us for the formative period.

Instead, we need to base our research and our conclusions from mediated sources that mostly paraphrase or refer to the textual productions of judges and jurisconsults of that time that were rarely copied verbatim, or their correspondence with each other. This means that the information is transmitted, and that the transmission of information needs to be critically assessed, whenever the existence of auxiliary source material allows us to. In evaluating the evidence, questions of authenticity and credibility need to be posed, as well as who followed which interests by inserting the respective information and how it was framed. As far as scholarly debates have already critically investigated the sources under study here, reference will be made to these arguments.

A recurring challenge seems to be that some passages in the sources might present an idealized image of the *qāḍī* and his work. Given that many authors of the *adab al-qāḍī* genre, the judicial chronicles and the legal compendia were either judges or close to the judiciary at point in their lives, the picture conveyed might portray the *qāḍī*'s own ideas about their status and role in adjudication. In other words, what claims to be evidence about the situation which existed in early Abbasid times might merely be a statement of what the scholars (often of a later time) thought should have been the case.[230] This possibility seems especially marked when we are dealing with works of the *adab al-qāḍī* type which are explicitly concerned with how things should be, rather than how they were in practice (even though the writings were likely to have been inspired by judicial practice).

Second, much of historical information is prosopographical information: Judicial and historical annals as well as biographical dictionaries are by nature narrative sources that provide names and details of dignitaries and functionaries, such as judges or scholars. This type of information readily lends itself to a prosopographical study, or "collective biographies". Early in the 20th century, European historians used the prosopographical

[228] Masud/Messick/Powers, *Islamic Legal Interpretation: Muftis and their Fatwas* (1996), p. 24.
[229] For instance, ʿAṭā b. Abi Rabbaḥ, mufti of Mecca, was consulted in the late first century A.H./ seventh century C.E. by the learned and the lay, see Motzki, *Die Anfänge der islamischen Jurisprudenz* (1991),p. 221.
[230] Kassassbeh, *The Office of Qāḍī* (1990), p. 34.

approach as a method of 'seeing behind' the traditional historical narrative.[231] The prosopographical approach highlights the biographies and careers of historical figures to give an additional layer of explanation for their course of action.[232] There is no way one can cover early Islamic legal history without the prosopographical approach as it delivers all the information omitted in annals, yet needed to figure out the persons involved in the course of history.[233]

The prosopographical approach has its weaknesses. It leads to a rich history of (mostly) scholars (*Gelehrtengeschichte*) but the biographical information conveys a static image, generalizes, and leaves little space to learn about developments- neither how the relationship of legal personae changed towards each other, nor how the law transformed. Also, prosopographical organizing principles give names and their biographies preference over thematic cohesion.[234]

Also, scholar of Islamic history *Patricia Crone*, though considering the prosopographical approach crucial to tackle early Islamic history, considers prosopographical information to be "gossip": "[T]he vast amount of information [in accompanying narratives] is gossip which cannot be used for what it asserts, only for what it conveys, primarily the background and status of the persons gossiped about." [235] While one certainly does not have to go as far *Crone* in dismissing all biographical information as gossip, it remains uncontested that it is information delivered by third persons whose interests need to be reflected. Often, as mentioned before, people are added to the list of a school to enlarge the number of its followers, and information on that person might be engrandized to highten his reputation *ex post*, just as severe criticism might be voiced to damage the credibility as a scholar. This only stresses that each genre needs to be complimented by other sources of information, if possible, and to combine Islamic prosopographical approach with the theme-related research on authority of legal personae.

[231] Cobb, "Community versus Contention" (2001) p. 106. For a fruitful discussion of the advantages and potential pitfalls of such an approach, see Stone, "Prosopography" (1971), pp. 46-79.
[232] Kunkel, *Herkunft und Stellung der römischen Juristen* (2001), p.x
[233] Crone, *Slaves on Horses: the Evolution of the Islamic Polity* (1980), p. 16-17.
[234] Van Ess, *Theologie und Gesellschaft* (1992), I , p. X.
[235] Crone, *Slaves on Horses: the Evolution of the Islamic Polity* (1980), p. 16-17. The quote starts in the following way: "To the extent that the pages of the Muslim chronicles are littered with names, prosopography is of course nothing but a fancy word for what every historian of that period finds himself to be doing…"

Third, the material is largely judge-centered. The period chosen for the strengthening of judiciary and the simultaneous nascent consolidation of the schools necessitates sources that bring in a judge-centered perspective. Material on judges was largely written by judges. Also, existent judicial chronicles and the Etiquette of the Judges literature emerged as early as the 2-3/9th century and thus precede existent fatwa collections and Etiquette of the Jurisconsult literature of the 13th century considerably and therefore explain the dominance of judge-centered literature. Many constellations in there were described and analyzed from the perspective of the judge, with a focus on best practice adjudication. Thus, there is a visible concern not to harm the central role of the single judge, and with generally mimimalizing the role of the jurisconsult – though the role of the jurisconsults' impact differed considerably according to the school of law the author belonged to. The authors of the judge-centered literature belonged, regardless of whether they were judges at point or not, to the class of scholars, nevertheless. Thus, it would be difficult to open up a dichotomy between judges and scholars, as the judiciary was largely recruited from the legal scholarly class, and after his removal from office, must judges would return to their scholarly career, if they had not held on to while adjudicating.

Fourth, the material on the development of the judicial system is predominantly Iraq-centered. This is especially true for the main judicial chronicle of Wakīʿ *Akhbār al-quḍāt* and the comprehensive chronicles of early Islamic and Abbasid history: The geographical focus of scholarly writing is on Iraq. Many scholars' focus on Iraq becomes evident even prior to the accession of the first Abbasid caliph Abū al-Saffāḥ at the Iraq city of Kafka in 132/749. Iraq thus became not only the centre of Abbasid Empire though it was already previously one of Islamic learning centers *par excellence*. Diverse circles of learning evolved into influential schools of law, theology and philosophy, attracted many students and scholars who came to take part in what developed into an Islamic culture of learning, with Iraq considered the cradle of learnedness.[236]
The provinces that were covered next to Iraq were of interest because of their wealth, such as Egypt in the West. In this sense, Kindī's detailed judicial annals sticks out as a

[236] On the learning culture in the teaching circles, see Chapter Four, III.

valuable exception[237], providing material from the province of Egypt and highlighting the relationship between center and, if not periphery, then province.

An interest in relating Abbasid legitimacy does not necessarily exclude the provinces. But when it is wedded to Abbasid imperial history, such an historical vision accords little room for consistent information. Often, information on the provinces in the larger annals is much shorter and thus less detailed. In this way, these early narratives of imperial history tend to obscure the local history of many provinces, leaving terse information to analyze.[238]

Significantly, with Kindī's account on Egypt a valuable counter-narrative to Abbasid judicial administration can be recalled, showing how it were local scholars in general, and jurisconsults in particular who challenged the judges sent from the capital Baghdad to Egypt, in both procedure and substance of law. With this, an important centre-province tension is added to the work.

The spotty regional coverage of the Islamic sources is a feature common to most provinces of the caliphate; some areas like North Africa received even less notice than Syria.[239] This can be largely explained by the fact that the early narrative sources served, even though not explicitly, to establish a line of caliphal legitimacy. In such a view of the history of the Muslim community, stress is given to the precedents, rise, and triumph of the Abbasid caliphate, which liked to portray itself as restoring justice by implementing God's law for the common good of the community. This conception of Abbasid legitimacy had consequences for the writing of history: The early chroniclers lived and wrote in a world where early Islamic history was "Abbasid history".[240] With the documentation produced from a largely Iraq-centered point of view, it largely gives way to a Abbasid narrative. This however, does not mean that critical aspects are entirely omitted. In fact, it is poetry that is used most often to critique the judges, and inter alia, the judicial system in place, as the next point shows.

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[237] Ibn Ṭulūn's The Judges of Damascus (Quḍāt Dimashq) is also one of these rare exceptions, with little relevance to this work though, as no encounters of judges with other legal personell are documented.

[238] With reference to Syria, see Cobb, "Community versus Contention" (2001), p. 104.

[239] Cobb, "Community versus Contention" (2001), p. 103.

[240] Cobb, "Community versus Contention" (2001), p. 104. These ideas are explored with greater depth in El-Hibri, *Reinterpreting Islamic Historiography* (1999); see also the ʿAbbāsid (Manṣūrid) dynastic concerns expressed in ʿAbbāsid historical writing on the ʿAbbāsid revolution: Lassner, *Islamic Revolution and Historical Memory* (1986); idem., "The ʿAbbasid Dawla: An Essay on the Concept of Revolution in Early Islam" (1989), pp. 247-70.

Fifth, judicial and general Abbasid annals are interspersed with the literary genre of poetry. The annalists included poetry as a critical intervention and gave room to poets, who were "the journalists and commentators of the day".[241] Thus, judicial annals included poems which are anything but 'marginal' but of direct relevance for understanding the local ideological currents and intellectual responses to Abbasid hegemony. Poetry included sharp criticism of some judges, their personal lifestyle (debauchery), real or rumoured bribery. But anecdotes that once made sense to early Islamic contemporaries as part of a larger tale now seem to puzzle us today. They can be full of analogy, and include insults that are today not directly recognized as such (e.g., guardian of the pigeons is used to depict a liar).[242]

The survey of the sources raises further fundamental methodological questions.
This work highlights the exceptional encounters of judge and jurisconsult rather than the more quotidian course of adjudication. Crucial for all historical research is the question whether the evidence represents a particular point of view which can be used as the basis of a generalization, or whether the circumstances it reports are unique. This becomes particularly important when the main challenge is to answer how to use a non-quotidian encounter as the basis of a generalization on authority of judge and jurisconsult.
Was the task of writing a judicial chronicle considered to capture the habitual and standard or the extraordinary and the atypical? Wakīʿ explicitly documents that he wanted to record the non-quotidian.[243] While Kindī and other authors do not make similar statements and do not qualify the character of the events, the documented encounters of judge and jurisconsult are in fact rare. Is the information recorded because it was considered noteworthy as a non-typical event? But can you record the non-typical without also illustrating the typical course of litigation, adjudication, or a judicial career? Even when Wakīʿ intended to cover the unusual, he made recourse to the reoccurring, like the details of judicial appointment, judicial bureaucracy or the locality of adjudication[244]. Some events were mentioned as having happened for the first time, were then considered to have established a tradition from then on, like the archiving of materials by judges or the employment of staff to the judge.[245]

[241] Ziadeh, "Integrity" (1990), p. 85. See in the case of capital punishment I Kufa, Chapter Four, I.3.e.
[242]See in the case of capital punishment I Kufa, Chapter Four, I.3.e.
[243] Wakīʿ, *Akhbār al-quḍāt*, I, p.5.
[244] See the detailed reports of the judicial office, Chapter Four, I.
[245] See the details of judicial bureaucracy, Chapter Four, I.3.

The question remains how the non-quotidian can shed light on wider legal contexts and systems of the law. How do we give single events wider meaning so that they can contribute to our understanding of Islamic legal authorities? In other words, to what extent can the study of Abbasid judges and jurisconsults contribute to our understanding of authority making in the formative period of Islam? How do we extrapolate from the pecularities of few historical experiences and a limited number of theoretical elaborations on legal authorities to make some observations or conclusions on authority in Islam? This question has been raised by microhistorians, who have asked how we can profit from an intentional "reduction of the scale of observation"[246] to highlight the potential of microhistory. The process of microanalysis is based on magnifying a circumscribed body of historical data in the hope of revealing new components, patterns, and connections[247] - on authority as a gradually developing question that essentially answers the question of who makes the law.

With all primary sources being usually fragmentary, ambiguous and difficult to analyze and interpret, this project poses no exception. The source material is full of gaps, making it necessary to reformulate the questions in a way that allows the sources to offer answers and at the same time offers variant value for this inquiry. While at times sufficient pieces of evidence could be found to support "thick layers"[248] for one idea, I was not successful in finding enough plausible references for other hypothesis. In those cases, I have remained transparent about the nature of my ideas being clothed with "thin layers" of argumentation. By and large, I will attempt to integrate as many possible conclusions to the information I could find, leaving a new starting point for research in this field to follow. Overall, the aim of the study is "to mark a possible access to the system" of law.[249]

[246] Levi, "On Microhistory", (1991), p. 95.
[247] See Levi "On Microhistory" (1991), p. 95; Hurvitz, *The Formation of Hanbalism* (2002), p. 7. Even though the preoccupation with aspects not central to the writings of the jurists of its time has its risks of over-grandizing events that were of little significance to the actors then.
[248] Geertz on "thick description" trying to read culture as a rich, multi-leveled text. Geertz, *The Interpretation of Cultures*, 1973. More generally, I am using thick layers particularly in contradistinction to thin layers, i.e. more fragile lines of argumentation necessitated through gaps and ambiguities in the sources of history and law.
[249] Van Ess, *Theologie und Gesellschaft* (1991), I, p. VIII.

Chapter Two. Normative Advice: Consultation as a Result of Uncertainty in Law

In the formative period of Islamic law, no explicit hierarchy was established between judge and jurisconsult.[250] Both judge and jurisconsult were acknowledged legal figures in the history of Islamic law when the Abbasid era startet in 132 A.H./750 C.E. and possibly what has put the two apart most was that the former belonged to the realm of the state, the latter was an individual scholar.[251] Because of the non-formalized lines of authority and because both judge and jurisconsults were specialists of one and the same law, the question of authority is intriguing and pertinent when both figures appear in adjudication. Central question of this chapter is to dissect the normative, prescriptive, arrangements of authority in the principle of judicial consultation (*mushāwara*): that the judge is advised to solicit an extradjudicial authority, a jurisconsult, for solving a court case. Judicial consultation knows normative and empirical precedence, and yet still leaves open many questions in its conception and application.

Given the barely demarcated relationship between these legal personae, my question is what judicial consultation tells us about the authority of judge and jurisconsult? How can we re-construct authority when there are no formalized criteria for a hierarchy of these authorities in law?

So while until now, it was generally assumed that there was no clearly delineated authority between judge and jurisconsult in the formative period of Islamic law, this chapter shall show that we now have reason to think that jurisconsults were designed as an authority to affect adjudication in many ways. The early debates over judicial consultation demonstrated that Muslim jurists had wanted anything but arbitratary discretion - a prevalent bias about the judge in Islamic law caused by Weber's infamous

[250] Later, under Ottoman rule (15th-20th century C.E.) while some jurisconsults remained private scholars, the Ottomans introduced the position of state *muftī (Shaykh al-Islam)*, a state employed official who officially watched over the judiciary and adjudication and whose *fatwās* had law-like effect on adjudication. Imber, *Ebu's Su'ud, The Islamic Legal Tradition* (1997); Jennings, *The Judicial Registers (Şer'i Mahkeme Sicilleri) of Kayseri (1590-1630) as a Source for Ottoman History*, Diss, UCLA (1972).

[251] On the history of *qāḍīship* in early Islam see Dannhauer, *Untersuchungen zum Qāḍī-Amt* (1975). On the origins of the *fatwā*-giving practice, see Motzki, "Religöse Ratgebung im Islam" (1994), p. 6-10.

notion of "Kadi-Justiz".[252] Instead, Muslim jurists sought for ways to tie judicial discretion to text, consensus and analogy as methods and to extrajudicial authorities in guiding, and if needed, constraining the judge. To prevent uncertainty from creating arbitrariness, this chapter shows that Muslim early consciousness for uncertainty showed a heightened sensibility for the complexities of the law, the burden of adjudicative rulemaking, and the professional necessity for consultation. Significantly, a heightened juristic consciousness of the uncertainties in law (*authority of law*) encouraged, and in part made obligatory, consultations between judge and jurisconsult (*authorities in law*).

I argue that the development of Islamic legal theory and methodology in the making was linked to making of personal authorities in law. In this way, I will link the evolving *authority of law* with the *authorities in law.* The development of the authority of law conditioned the development of the authorities in law, and vice-versa. Both have in common that just like the *authority of law* claims allegiance and obedience[253], so do *authorities in law*. This understanding suggests that the role of judicial consultation and the relationship between judge and jurisconsult is linked to the understandings of a dynamic theory of law. As their authorities were barely defined vis-à-vis each other, judges and jurisconsults engaged in a struggle with each other (and with those outside the field of legal professions) to gain and sustain acceptance for their conception of the law's social whole and the law's internal organization.[254] The intrinsic link between the *authority of law* and the *authorities in law* is underlined by the conception that Islamic law developed from its beginning as "jurists' law"[255], i.e. it was largely autonomously formulated by Muslim legal scholars based on divinely revealed sources, with little involvement of ruling state authorities.[256] Islamic law as "jurists' law" allowed for multiple, equally valid interpretations. This normative plurality was a consequence of the very present problem of rule-indeterminacy in Islamic law. The Islamic legal system had to deal with the same sources of indeterminacy that challenged other legal systems: ambiguous language, seemingly contradictory rules, the occurrence of cases that were

[252] Much of this blameworthiness may be laid upon *Max Weber* who wrote that "Kadi-justice knows no rational 'rules of decision' and therefore no accountability. Weber, *Wirtschaft und Gesellschaft* (1980), p. 477.
[253] Raz, *The Authority of Law* (2009), p. 3.
[254] See the introduction by Terdiman of Bourdieu, "The Force of Law" (1987), p. 808 about legal professionals' role within the juridical field.
[255] Schacht, *An Introduction to Islamic Law* (1964), p. 5, 209. One should note that many of the views in this work are now generally considered to be dated; this, however, does not apply to the issue at hand.
[256] Hallaq, "The Author-Jurist and Legal Change" (2001), on author-jurists as agents of change in Islamic law.

not anticipated by a rule, etc.[257] As the problem of rule-indeterminacy was discussed also in German and US-American legal scholarship[258], a comparative look is useful for assessing which structural difficulties indeterminacy poses for constructing the *authority of law* as well as for the *authorities in law*.

Thie challenge of rule-indeterminancy is further complicated by the fact that Islamic law is grounded in divine sources and the unique revelatory experience of the Prophet Muḥammad. As this revelation stated both that God was the ultimate legislative authority, and that revelation had ceased after Muḥammad, Islamic law was disconnected from its primary legislative authority upon the death of the Prophet.[259] This meant that legislative activity could only continue by legal interpretation of the original rules provided by revelation. But whose prerogative should the interpretation of Islamic law become?

This chapter is based on the normative writings of Muslim jurists of the formative period. It first provides for the foundations of Islamic law and the conceptions of adjudication insofar as they are relevant for the normative question of judicial consultation (*mushāwara*) instigating the theme of authorities in law. The central theme of judicial consultation is discussed in Chapter Three, III onwards. The perceived burden of interpreting and applying the law, particularly in adjudication, will underline the consciousness with which Muslim jurists approached their *ius divinum*. The chapter then focuses on the roles of judges and jurisconsults in adjudication, their qualifications and the moments and natures of their encounters over questions of interpretations in adjudication. These aspects are linked to larger questions of debating authority in the face of indeterminacy in Islamic legal theory.

Two legal scholars of the 3rd/9th century, Khaṣṣāf and Shāfiʿī were the first to elaborate on both the relationship between judge and jurisconsult as well as on challeges of interpretation in the face of uncertainty. I present and compare their scholarship as each representative for normative debates on uncertainty and authority within the Ḥanafī and Shāfiʿī school respectively, before the succeeding Chapter Three will take up consultation and legal authorities in the realities of Islamic legal history.

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[257] Fadel, *Adjudication in the Mālikī Madhhab* (1995), p. 220.

[258] On authority and uncertainty, see Chapter One, I.2.d.

[259] This was the understanding of Sunni Muslims. Shīʿa Muslims, on the other hand, accepted the principle of an infallible ruler, or Imām, who could provide Muslims with rules that substantively represented the divine will.

I. A Brief Typology of Judge/Judgment and Jurisconsult/Legal Opinion

A typical characteristic of both judge and judgment on the one side and jurisconsult and legal opinion on the other in the overall legal system might be useful to carve out specificities of encounters between these two legal personae.[260]

The legal text productions of judge (the judgment) and of jurisconsult (the legal opinon) reflect the realms of coercion and persuasion: The judgment in Islamic law (*ḥukm*) is the result of a particular and concret litigation case. It is applied law unique to only the litigants and event judged (*inter partes*), it is coercive as it is enforceable by the police (*shurṭa*). The judgment is valid unless it is reviewed or annulled by another judicial authority, though reasons for revision or annulment are restricted to explicit violations of authoritative texts, not to possible interpretations of authoritative texts.[261] *Qadā'* (the activity of adjudication) is a state authorized activity, and litigation was governed by the strict rules rules of evidence, oath and confession.

A legal opinion (*fatwā*) can be solicited, i.e. requested by a judge, or unsolicited, i.e.issued without or even against the wish of a judge, it can be asked for by a judge but also more generally by anyone interested in a qualified answer to a problem, specifically for or independent of a case of litigation. Unlike a judgment, it is not binding *per se*. The *fatwā* becomes binding only if the person voluntarily accepting the counsel for him- or herself considers it persuasive and decides to adopt it. The *fatwā* is persuasive when the jurisconsult succeeds in the intentional effort at influencing another's mental state, behaviour or action through communication in a circumstance in which the persuadee has some measure of freedom[262], or autonomy. As a consequence of this freedom or autonomy, Muslim scholarship demands that the requestor of the *fatwā* has the responsibility to examine the explanation before following the *fatwā*.[263] The *fatwā* is considered valid and authoritative only if and in so far as it is considered persuasive and followed by the advisee, there is no other way to enforce it as such. Thus, the *fatwā*

[260] Typologies of judges and jurisconsults emerge later in the 7th-8th/13-14th century, see Ibn Qayyim al-Jawziyya, *I'lām al-Muwaqqi'īn*, I, p. 38; Jackson, "The Second Education of the Mufti: Notes on Shihab al-Din al-Qarafī's Tips to the Jurisconsult" (1992); Reinhart, "Transcendence and Social Practice: Muftīs and Qāḍīs as Religious Interpreters" (1993).
[261] On revision and annulment see Powers, "On Judicial Review in Islamic Law" (1992).
[262] O'Keefe, "Theories of Persuasion", (2009), p. 274.
[263] See Makdisi, "Magisterium and Academic Freedom" (1990), p. 121.

differed detrimentally from the judgment as an enforceable legal decision, handed down by a judge.

As to the temporal and personal validity of judgment and *fatwā*, it was generally considered (though only later concisely formulated) that the decision of the judge is particular and specific (*juz'ī, khāṣṣ*) and that it applies only to a particular case and its litigants, whereas the *fatwā* of the jurisconsult is general and universal (*'āmm, kullī*) and thus potentially applicable to all similar cases, going beyond the narrow case of the questioner to govern equivalent cases.[264] Therefore, the legal opinion in Islamic law sets out the legal situation in general and abstract terms and therefore has potentially universal application to the class of persons to whom the abstract ruling applies.

In its typical form a *fatwā* consists of two parts (whether oral or written): a question and an answer. The question addressed to a *muftī* (a legal scholar acting as jurisconsult) can be about a particular topic in order to obtain the scholar's opinion about this topic from the perspective of Islamic law. This part of the *fatwā* is entailing the question is called *istiftā'*, while the person who raises the issue – judge or layperson – is called the *mustaftī*. The topics in principle may deal with any conceivable topic, and next to legal questions also address ritual or social and political issues, in short any question that deals with what is lawful in Islam.
The second part of the *fatwā* is the actual answer given by the *muftī*, the "*fatwā*-giver", a legal scholar. In the *fatwā,* the *muftī*, answers the questions posed to him or her, by typically referring to principles of law as developed by leading jurists or him-/herself.
Whereas a judgment commands or forbids direct action, a *fatwā* provides access to legal knowledge in the form of a considered opinion. Whereas a judgment intends to be final (*qat'ī*), terminating a lititgation, a *fatwā* makes a contribution to the arena of competing opinions[265] where persuasive argumentation is key for acceptance.

The *muftī* asked to act as a legal expert by the *qāḍī* does not have to check the facts mentioned in the question, assumes the fact of the case to be true and exclusively decides on the doctrinal question. The examination of the facts through evidentiary procedures

[264] Hallaq, *Authority* (2001), p. 192 citing 14th century scholar Ibn Qayyim al-Jawziyya, *I'lām al-Muwaqqi'īn*, I, p. 38. Similarly, Masud/Messick/Powers, *Muftis, Fatwas and Islamic Legal Interpretation* (1996), p. 19.
[265] Masud/Messick/Powers, *Islamic Legal Interpretation*: *Muftis and Their Fatwas* (1996), p. 19.

remains the exclusive task of the *qāḍī*. [266] *Iftā'* (the opining by *muftīs*) was an integral part of the judicial process, as the opinion instrumentally served in the interpretation and application of legal doctrine at court.[267] During the course of time, *fatwās* issued by *muftīs* have been collected and referred to by jurists as works of normative value, inside and outside of court.[268] Also, legal treatises increasingly entailed sections covering *iftā'* as an elementary literary production of Islamic law.[269]

To study the workings of authority, the activities of adjudication (*qāḍā'*) and the issuing of legal opinions (*iftā`*) are insightful: While the judge expresses his authority through his judgments, the *muftī* does so through his *fatwās*. Litigants or petitioners turn to judge or jurisconsult because they are considered able to produce authoritative legal statements, and to each contribute to the authority of the law, allegiance and obedience. While the judge was installed by the caliph to adjudicate cases and could refer to this delegated authority, the *muftīs* issued their legal opinions without officially being installed to do so, without giving their legal opinion an official character. They issued their legal opinions as private scholars as there was no office of *muftīship* in the formative period.

It should be noted that one and the same person could be judge or legal scholar acting as jurisconsult at different points in their lifes. This was especially the case given that judges were recruited from amongst the legal scholars and could return to their field of legal scholarship after ending, or interrupting, their career within the judiciary. [270] The difference between them is therefore functional. The fact that these two personae invested in authority come together over adjudicative cases is *per se* a significant constellation for the question of who makes Islamic adjudicative law. Islamic scholars of law took different approaches to assess the nature and necessity of their encounters in judicial consultation.

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[266] Johansen, "Islamic Law: Genres of Legal Literature" (2009), p. 321; Ibn al-Qayyim al-Jawzīyya, *I'lām al-Muwaqqi'īn* (1969), I, p. 38, Masud/Messick/Powers, *Islamic Legal Interpretation: Muftis and Their Fatwas*, (1996), p. 19.
[267] Masud/Messick/Powers, *Islamic Legal Interpretation: Muftis and Their Fatwas and* (1996) p. 15. Tyan also treats *iftā* as part of adjudication, Tyan, *Histoire d'organisation judiciare* (1960), pp. 214-218.
[268] See for instance, Powers *The development of Islamic law and society in the Maghrib: Qadis, Muftis and Family law* (2011), and idem., *Law, Society and Culture in the Maghrib* (2002).
[269] See Masud/ Messick/ Powers, *Islamic Legal Interpretation: Muftis and Their Fatwas* (1996), p. 15 with further references for the Shāfiʿī and Mālikī schools of law.
[270] For Ḥanafī judges ad legal scholars see Tsafrir, *The History* (2004), p. 70-85.

II. Early Formation of Islamic Legal Theory (*Uṣūl al-Fiqh*) and Schools of Law

The authority of judge and jurisconsult developed against the backdrop of major debates on the course of Islamic jurisprudence. From early on, jurists debated the meanings of textual and the scope of non-textual sources of Islamic law next to Qur'ān and Sunna (Prophetic traditions), necessitated by a consciousness for and debate of uncertainty in law. In this study, disputes on what to consider legitimate sources and methodology under conditions of uncertainty shall prove as key for the principle of consultation between judge and jurisconsult.

The Qur'ān (45:18) states that God has sent down a "sharīʿa" (path) which Muslims were obliged to follow. Muslims understood "Sharīʿa" to mean a body of rules and recommendations and they set out to develop competences and skills to examine and comprehend these. Debates emerged about the methods that should be used to interpret the rules and recommendations and accordingly about what, in fact, the Sharīʿa required.

The first three centuries of Islamic history (7-10th centuries C. E.) were thus marked by Muslims intensely arguing and disagreeing about what exactly Islamic law was and how it could be determined. Scholars debated questions of epistemological authority, methods of jurisprudence, and theories of legitimacy that determined Islamic law as it should be applied in Muslim societies.[271] To reflect the intellectual background of the time, the Islamic legal tradition does not only disagree but also takes pride in its methodology developed for studying the differences in the interpretation of the Qur'ān and the differences in the transmissions of the *ḥadīth*, reports about Prophet Muhammad's words and practices. Since the beginning of the development of substantial law (*fiqh)*, disagreement (*ikhtilāf)* among the jurists not only existed and had its firm place within scholarship but was also appreciated.[272]

Nascent schools of law (*madhhab*, literally "way of proceeding") had formed that were associated with regional centers within the Abbasid Empire, particularly Iraq (Kufa, Basra, Baghdad), the Ḥijāz (Medina, Mecca), Damascus and Fustat/Egypt. Scholar-jurists often acted as independent scholars and yet became increasingly aligned with

[271] Lombardi, *State Law as Islamic Law* (2006), p. 14.
[272] Masud, "Ikthilaf al-Fuqaha" (2009), p. 65.

what later became known as different schools of law (*madhhabs*) that each differed on methodological and substantial matters. [273]

These schools of law were associated with eponymous founders, and membership within them was acquired through following doctrines that were associated with the school. [274] There were multiple *madhhabs* during the early centuries of Islamic law, but four survived as authoritative schools of interpretation in the Sunni tradition. These were associated with the name-givers: Abu Ḥanīfa (d. 767), Mālik ibn Anas (d. 796), Muḥammad ibn Idris al-Shāfiʿī (d. 820), and Aḥmad ibn Hanbal (d. 855), and the schools were accordingly called Ḥanafī, Mālikī, Shāfiʿī, and Hanbalī. As educational institutions and as individual jurists they recognized one another's competing interpretations as plausible, valid, and legitimate interpretations of God's law – a consequence of the consciousness of the law's probability in the absence of certainty. Their adherents recognized each other's legitimacy, yet also asserted the superior rigor and analysis of their own school. Following the principle to "agree to disagree" this lead not only to a distinct legal genre of *ikhtilāf* (disagreement amongst jurists) but also to the emergence of Islamic schools of law lead to the acknowledgment of a certain range of pluralism.[275] More significantly, scholars endorsed and expressed the doctrine of juristic probability, not certainty, as the basis for legal interpretation.[276] It is because of this practiced pluralism and reflected consciousness for the realm of juristic probability that judges and jurisconsults were encouraged to engage in judicial consultation, as this chapter shall show.

In the following, I give a brief insight into what constituted some of the major debates on sources and methodologies of Islamic law. This shall serve as an overview on Islamic law but it shall also give early hints at what, in part, became subjects of debate that informed the authority of judge and jurisconsult. Only where there was debate over *what*

[273] On the early development of the schools of law, see Hallaq, *Origins* (2005), pp. 150-177; Makdisi, "The Significance of the Sunni Schools of Law" (1979), pp. 1-8; Weiss, "The Madhhab in Islamic Legal Theory" (2005), pp. 1-9.
[274] For the process by which scholars increasingly came to abandon the practice of recognizing multiple authorities and instead came each to focus on the legal tradition that coined a particular school, see Hallaq, *Authority* (2001), pp. 57-65; Lombardi/Feener, "Why Study Islamic Legal Professionals" (2012), p.5.
[275] This acceptance of "mutual orthodoxy" is a distinctive and much commented upon fact of Islamic legal theory. For rich and extended discussions both of the fact and its implications, see, for example, Johansen, *Contigency in a Sacred Law* (1999), p. 1-72; Weiss, *The Spirit of Islamic Law* (1998), pp. 88-144.
[276] See also Reinhart, "When Women went to Mosques" (1996), p. 116.

the law shall be, it becomes necessary to question *who* shall deliberate and decide about the law.

Islamic jurisprudence (*fiqh*) constitutes a system of legal and ethical norms that attempts to derive its rules from the texts of the revelation (1. the Qur'ān), the normative praxis of the Prophet (2. the Sunna), the consensus of the legal community of scholars (3. *ijmāʿ*) and analogies derived from the authoritative texts (4. *qiyās*). Next to these four agreed upon sources of law, further forms of reasoning existed, depending on the school of law. This four sources theory is a post-formative construction of the law, i.e. it emerged as solid consensus only after the period under study here. In fact, of the many sources debated by the jurists in the formative period, it was eminent jurist Shafiʿī who suggested and largely succeeded in reducing disagreement between the jurists by restricting the sources to precisely these four mentioned.[277] During the formative period, the jurists (*fuqahāʾ*) who authored Islamic doctrines and rules produced a great number of competing norm suggestions that have constantly contributed to the differentiation of Islamic law, yet eventually followed Shāfiʿī's four source theory.[278] However, even within each school different positions have always been developed, defended and acknowledged. [279]

1. Qur'ān and Sunna: Authoritative Texts

The Qur'ān is the primary source of normativity, it is the word of God revealed to Prophet Muhammad in Arabic, literally reproduced and transmitted by him, and finally written down. The Qur'ān encourages scholars to develop methods to discover its

[277] Shāfiʿī's prominent legal theory of the four sources of Islamic law was proposed in the early ninth century C.E., and yet comes into full existence only in the second half of the tenth century, Hallaq, "Was Shāfiʿī the Master-Architect" (1993), pp. 587-606; Hallaq, *A History of Islamic Legal Theories* (1997), p.33; Melchert, *The Formation of the Islamic Schools of Law* (1997).

[278] This acceptance of "mutual orthodoxy" is a distinctive and much commented upon fact of Islamic legal theory. For rich and extended discussions both of the fact and its implications, see, for example, Johansen, B., *Contigency in a Sacred Law* (1999), p. 1-72; Weiss, *The Spirit of Islamic Law* (1998), pp. 88-144.

[279] Johansen, "Genres of Legal Literature", Encyclopedia of Legal History, (2009) vol. III, p. 321. Other jurists have come up with additional principles of interpretation as sources in Islamic law: *al-maslaha al-mursala* (public interest which is neither affirmed nor forbidden specifically in the primary sources); *istishab* (presumption of continuity of the past conditions in a ruling); a*l-bara'a al-asliyya* (the principle that things are originally permissible until forbidden); *al-istiqra'* (inductive logic); *sadd al-dhara'i'* (adopting preventive means); *istidlal* (extending the application of a ruling by human reason); *istihsan* (juristic preference); *al-akhdh bi'l akhaff* (choosing the minimum); and *al-'isma* (infallibility of judgment). Masud, "Ikhtilaf al-Fuqaha" (2009), p. 77, referencing Shihāb al-Dīn al-Qarafī (d. 1285) who lists nineteen sources used by the jurists. Qarāfī, *Al-Dhakhira*, p. 14.

meaning. The Qur'ān (3:7) declares that some of its verses are clear (*muḥkam*) and others are ambiguous (*mutashābih*). Scholars thus had to devise methods how to identify and distinguish the clear from the ambiguous verses. But even the clear verses evoked disagreement on the understanding of words, concepts, and phrases.[280] Scholars developed theories of, for instance, abrogation (*lex posteriori*), contextualisation via the theory of reasons for revelation (*asbāb al-nuzūl*), or approaches to analyze the verses individually or systematically in the Qur'ān as a whole.[281]

The status of the Sunna and its authentication stirred much more debate. In fact, the Sunna was one of the main challenges for scholars, around which many questions of binding sources and interpretations circled.

Muslim legal scholars use the term Sunna to indicate legally relevant words or actions of the Prophet, or his tacit consent. While Sunna is the corpus of Prophetic traditions, the single tradition, or report, is called *ḥadīth*. The *ḥaḍīth* reports always come with attached chains of transmitters (*isnād*), in the form of "so and so related to me on the authority of so and so" and so on back to the text itself containing the information itself (*matn*). The information then was a statement of what the Prophet, or a close contemporary (a Companion) or sometimes someone from the following generation (a Successor) said or did in a particular situation.

The legally binding nature of the Sunna is first anchored in Qur'ānic verses that request the believers to obey the orders of the Prophet[282], and second from the Prophet in which he approves or recommends people to follow the Qur'ān and his Sunna.[283] They are considered to constitute legal precedents and thus have binding effect.

Yet, the status of the Sunna as a source of religio-legal authority is less clearly defined and more controversial than it may at first appear. In contrast to the Qur'ān, the Sunna does not consist of one (compiled) book containing divine speech but rather of a huge number of texts transmitted separately that had been put together by *ḥadīth* scholars in (what succeedingly would be called canonical) collections later (eight and ninth centuries C.E.).

[280] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 74.
[281] On the methodologies of Qur'ānic studies, see e.g. Bauer, *Aims, Methods and Contexts of Quranic Exegisis* (2013).
[282] For instance Qur'ān 4: 59; 65, 80; 59: 7; 33: 36; 24: 64.
[283] Motzki, "Islamic Law: Transmission and Authenticity of the Reports of the Prophet" (2009), p. 331.

The corpus of Prophetic traditions (*Sunna*) is regarded as the second most important source of Islamic normativity alongside the Qur'ān, complementing the divine word with the exemplary practice of the Prophet and certain members of the early community. The Sunna thus can corroborate a legal rule of the Qur'ān, and it can also explain, specify, or state a rule of the Qur'ān more clearly. Yet the precise relationship between Qur'ān and Sunna caused debate between the scholars: Dispute rose over the cases in which a *ḥadīth* has no obvious anchoring in the Qur'ān or even contradicts a Qur'ānic verse. One central issue in the debate is whether the Sunna is a legal source independent of the Qur'ān and can replace a Qur'ānic rule. In the debate some argued that every legally relevant *ḥadīth* must be corroborated by the Qur'ān. Others took the view that that the Sunna has an independent probative force for the establishment of Islamic law.[284]

Possibly more far-reaching was the jurists' debate on whether or not the sayings of selected members of the community, like the Companions of the Prophet or their Successors should be included in the Sunna, given that they often heard the Prophet elaborate on some (legal) problems and thus became a source of valuable normative information themselves. In fact, a significant development on the very definition of Sunna preceded this debate: Sunna is in fact an ancient Arab concept that means the exemplary mode of conduct. Thus there was a simulteaneous practice of referring to the statements and acts of other forebearers, like earlier Prophets and early companions. This meant that in the formative period, multiple and differing understandings of "Sunna" as precedence circulated, and allowed the judges to apply different legal precedence, which could be understood as "subjective notions of justice" [285]. This is why caliphal secretary Ibn Muqaffa' in his critique that there were too many understandings of Sunna in place, leading to a disorganized state of the law in the Empire, called for the codification of the law.[286] This plural practice came to be increasingly critized, and around two hundred years later rejected by scholars, particularly by eminent jurist and school eponym Shāfiʿī (d. 820). He successfully argued that Sunna needs to be focused on the reports of the

[284] On the debate of the role of the Sunna regarding the Qur'ān, see Berg, *The Development of Exegesis in Early Islam* (2000).
[285] Hallaq, *Origins* (2005), p. 46.
[286] On (failed) codification, see Chapter Four, II.

Prophet and those elaborating on his Sunna, and not other forebearers. [287] This debate was relevant as it was a question of constituting precedent which was not allowed to be violated. If no Sunna existed on the question it meant that there was no consensus and that the lacuna was open for interpretation – and thus consultation. The question of the scope of Sunna, extending to the Companions and their Successors, was therefore also discussed in the advice literature for judges (*adab al-qāḍī*), addressed below[288], aiding judges in sorting out in how far they were bound by precedent or could reach out for interpretive methods.

The disagreement about the criteria for an authentic *ḥadīth* became particularly pertinent for establishing precedent. The *ḥadīth* scholars devised complex methods to verify the reports of *ḥadīth* on the basis of reliability of the reporters (i.e. the chain of narrators linked to the Prophet Muhammad) and on the quality of information contained. Both criteria formed the categories for the soundness of the *ḥadīth* reports.
Like Qur'ān exegesis, *ḥadīth* scholarship developed into a highly elaborate science, especially with regard to the normativity of specific categories of reports.[289] Methods and categories of criticism for grading transmitters and ḥadīths according to their reliability were devised, making Sunna a key source for Islamic law, yet one that evoked much argument.

2. Filling in the Gaps: Authoritative Consensus and Text-Based Analogy

Jurists used several other sources and methods in addition to Qur'an and *Sunna*.
Consensus (*ijmā'*) and analogy (*qiyās*) were developed as further key sources of law, though strictly speaking they are methods of law. However, both consensus and analogy utilize material sources as a basis for building law through the construction of consensus and analogies.[290] In fact, however, in the second/eighth and third/ninth centuries, substantive legal questions were not separated from the methodological and theoretical

[287] For a detailed debate of the linguistic and legal understandings of Sunna amongst the leading jurists in the 2/8th century, see Ansari "Islamic Juristic Terminology" (1972), pp. 258-282; Hallaq, *Origins* (2005), p.46-53.
[288] Chapter Two, V. 2.b.
[289] Krämer/ Schmidtke, *Speaking for Islam* (2007), p. 4.
[290] Weiss, "Islamic Law: Sources and Methodolgy of the Law" (2009), p. 319, refering to analogy.

questions of Islamic jurisprudence.[291] Often, they were jointly discussed in the context of a particular case.

Yet, in the ninth century, the question of whether it is lawful to base legal rules on the reasoned opinion and juristic preference of the jurists or whether they must be based either on Qur'ān or Sunna or on analogical conclusions drawn form them, leads, for the first time in the history of Islamic jurisprudence (*fiqh*), to a separation between the material and the methodological and theoretical questions of the legal rules and to a rearrangement of the legal material. The first jurist to make such a distinction into legal material and legal method is Shāfiʿī (d. 820), who in his monograph *Risāla* (Epistle) systematically develops this distinction.[292]

According to classical Islamic theory, consensus (*ijmāʿ*) is a further, third source of Islamic law. In the formative period, it can be seen that consensus is referred to by all schools of law of that time, though with different takes on whose consensus should be legally relevant.[293] Some argued for the consensus of all Muslims, others for the scholars of Medina and Kufa (as the cities that were home to the most prominent jurists of the time).[294] Others yet argued that the four caliphs and the family of the Prophet shall be included.[295] Others yet, wanted the community of scholars of law only[296], excluding the scholars of theology as they were considered incompetent in the field of legal reasoning.[297] Until the third/ninth century, consensus remained a vague inclusion/exclusion. The notion of consensus that eventually prevailed was the one of the community of legal scholars.

The generally held aim of consensus was that it transformed opinion into certainty, a tentative construction into a final conclusion.[298] As soon as an opinion was shared by all living qualified scholars of the law, the opinion was considered binding law for all. While no individual scholar could acquire certainty based on personal interpretive effort, the community consensus of scholars agreed that their concerted efforts could produce a

[291] Johansen, "Islamic Law: Overview", (2009), III, p. 316.
[292] Johansen, "Islamic Law: Overview", (2009), III, p. 316.
[293] Ansari, "Islamic Juristic Terminology" (1972), p. 282-287.
[294] Hallaq, "On the Authoritativeness of Sunnī Consensus," (1986), p. 430.
[295] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 77.
[296] See Ansarī, "Islamic Juristic Terminology" (1972), p. 286.
[297] Johansen, "Islamic Law: Overview", (2009), III, p. 315.
[298] Weiss, "Islamic Law: Sources and Methodology of the Law", (2009), III, p. 319. On the formation of consensus Hallaq, *Origins* (2005), pp. 150-177.

firmer result than their separate endeavors as individuals.[299] In this way, consensus (*ijmāʿ*) brought about an epistemic transformation without actually becoming a material source of law.[300] In this sense, consensus as sharing the risks of uncertainty in law is a theme that also affects adjudicative law-making of judge and jurisconsult: When both concur in opinion, a joint consensus is established that should not be violated.[301] However, when they dissent, the question of trumping authority becomes relevant.

While Sunnī legal tradition established the authoritative texts of Qur'ān and Sunna as primary sources of normativity, it also authorized the turning to nonscriptural sources such as legal reasoning. Precisely because there largely was legal consciousness for the need of legal reasoning beyond authoritative texts – the core issue of conflict of authorities – its undertaking was sought to be regulated.

There was particularly heated concern regarding the use of legal reasoning as a further source of law. At first, scholars discussed the legal implications of the Qur'ān against the background of local custom and discretionary opinion (*raʾy*).[302] Legal reasoning was initially based mainly on common sense and practical considerations, and applied as such in adjudication.[303] However, from the middle of the first century A.H. (ca. 670 C.E.), the opinion emerged that legal rulings should be based not only on the Qur'ān and human reasoning, but also on the Prophetic Sunna. [304] Thereby, Islamic legal norms were anchored, where possible, in divine revelation and less in human reasoning, thus enhancing the divine character of Islamic law to the furthest extend possible. Eventually, this idea dominated Islamic law: From then on, interpretive efforts (*ijtihād*) were no longer allowed if there were clear Qur'ānic texts or ḥadīth.[305]

The discussion then focused on the type and scope of reasoning that was permitted. The rationalists (to whom we turn shortly) claimed that all sorts of discretionary reasoning (*raʾy*) were allowed, while the other camp, the traditionalists, opposed human

[299] Weiss, "Islamic Law: Sources and Methodology of the Law", (2009), III, p. 319.
[300] Weiss, "Islamic Law: Sources and Methodology of the Law", (2009), III, p. 319.
[301] On consensus between judge and jurisconsult in the writings of Khaṣṣāf, see in this Chapter Two, V. 2.b.
[302] On the use of discretion in early adjudication in the first century of Islam, see Hallaq, *Origins* (2005), pp.44-46; 52-54.
[303] See Hallaq, *Origins* (2005), p. 54.
[304] Peters, "Individual Effort of Legal Reasoning", Oxford Encyclopedia of Legal History (2009), III, p. 224.
[305] Discretionary opinion (*raʾy*) and legal reasoning (*ijtihād*) were technically speaking in many cases overlapping, and at least interconnected, Hallaq, *Origins* (2005), p. 54.

interpretation of the revealed texts, arguing that their divine character becomes compromised. In a society committed to the authority of revelation, the use of reasoning in a law which sought religious legitimacy was a sensitive matter.[306]

To meet the critique of an undefined and thus unrestricted use of legal reasoning, the theory of analogy (*qiyās*), which represents a gradually successful attempt to restrict and set formal limits to the use of discretionary opinion (*ra'y)*, was elaborated. [307] Eventually, the majority of scholars adopted the opinion that independent effort of legal reasoning (*ijtihād*) should be permitted as a form of analogical reasoning (*qiyās*).
Ijtihād is derived from two words: *juhd* (exertion of effort or energy) and *jahd* (the forbearance of hardship, namely, striving and self-exertion in any activity that entails a measure of hardship). [308] It means the all-encompassing expenditure of effort to arrive at the correct judgment, which can be by inferring a ruling or a juristic and linguistic theory.[309] Differently put, *ijtihād* is "the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of the Sharīʿa from their detailed evidence in the sources".[310] Those jurists that were qualified to exercise *ijtihād* and thereby produced new law going beyond the text were called *mujtahid*, a jurisprudent of the highest rank. In opposition to those who would (merely) conform to or imitate someone else's legal opinion (*muqallid*).

In spite of early normativity and practice of legal reasoning (*ijtihād*), the extent to which it could be used became a major question in the first centuries among scholars. *Ijtihād* emerged from the consciousness that if the texts allow for multiple interpretations or there is no text which refers directly to the legal issue in question, the qualified jurist has to exert his own independent reasoning (*ijtihād*). *Ijtihād* emerged as a central and much disputed concept within the Islamic legal system, and proved to be key for the normative elaborations of judicial consultation.

And yet, while there emerged recognition that authoritative texts did not cover all legal problems and interpretive reasoning (*ijtihād*) was in principle agreed upon as a method to

[306] Lambton, *State and Government* (1981), p. 8; Ansari, "Islamic Juristic Terminology" (1972), p. 288.
[307] Lambton, *State and Government* (1981), p. 9.
[308] Ibn Manzur, "Juhidah", *Lisān al-'Arab*, II, pp. 133-34.
[309] Kayadibi, "Ijtihād by Ra'y" (2007), p. 75.
[310] Kamali, *Principles of Islamic Jurisprudence* (2003), p. 469.

derive new law, interpretive reasoning was criticized as a concept way too wide, with little connection to the text. This is why critics advocated for analogy as a text-based form of interpretive legal reasoning. Analogy should define the contours of *ijtihād*. This meant that cases for which there was no clear text should be solved by applying a text giving a ruling on a similar but not identical case, or by expanding the application of a text on the ground that the underlying *ratio legis* (*ʿilla*) is applicable to the case. In the absence of text or consenus, the method of analogy could still be based on text, refering analogy back to the rationale (*ʿilla*) as entailed in other texts. This is the crucial difference between *ijtihād* and analogy- while the latter is based on text, the former is not. [311]

The first one to elaborate this doctrine was Shāfiʿī (d. 820). His synthesis between what became called "the traditionalist" (more text orientated) and the "the rationalist" (more reason orientated) positions gained popularity (around the 10th century) but was nevertheless challenged by numerous jurists. Many scholars allowed different forms of reasoning besides analogy. The Ḥanafīs Abū Yūsuf and Shaybānī in particular claimed that solutions based on strict analogical reasoning in a specific case could be abandoned in favour of a doctrine that might be formally less systematic or rigid, but more practicable and appealing to commonsense or in favour of considerations of equity and justice. [312] Principles that allowed for a more practical ruling or a ruling more in line with public interest were upheld. The Ḥanafīs called this *istiḥsān* (preference) or *istiṣlāḥ* (regarding something to be in the public interest). These last principles were much critized by the Shāfiʿīs and they reflect Shāfiʿī's fears of judicial activism, adjudication beyond authoritative texts and methodology.

3. Constructing the Law: Between "Rationalism" and "Tradition"

This overview over the dynamics of Islamic law during the first three centuries is crucial also for understanding the ideological-intellectual scenery of the law: From the late eighth century to the beginning of the tenth century (the formative period), there raged fierce controversy between those who would found their jurisprudence exclusively on

[311] Schneider, *Das Bild des Richters* (1990), p. 217.
[312] Ansari, "Islamic Juristic Terminology" (1972), pp. 288-294, especially p. 294; Peters, "Individual Effort of Legal Reasoning", Oxford Encyclopedia of Legal History (2009), III, p. 224.

ḥadīth and those who reserved a leading place for rationality.[313] The principal division among Muslim jurists of that time was therefore that between the so-called "traditionalists" (*aṣḥāb al-ḥadīth*) and the so-called "rationalists" (*aṣḥāb al-ra'y*), between proponents of scriptural authority in law and theology and authority based on reason.

The traditionalists based their understanding of law on *ḥadīth* reports from earlier authorities. Calling them traditionalists is related to the problematic translation of ḥadīth as "tradition", not necessarily because the reports themselves had established any tradition. [314]

The juridicial program of the adherence of ḥaḍīth (*aṣḥāb al-ḥadīth*) was to collect *ḥadīth* as precedence, so that all later legal cases could be based on precedence rather than having to systematically refer to human reasoning.

Traditionalists have tried to minimize reliance on human reasoning, even when that meant to base their jurisprudence on disputed *ḥadith* or on *ḥadīth* reports from others than the Prophet.[315] The textual basis of the traditionalists did include *ḥadīth* reports from Companions and Successors, so that they could base every single item in their doctrine on a previous report (*ḥadīth*).[316] Their idea was that one should not adopt juridical positions contrary to what the predecessors were known to have adopted,[317] and keep to the original intent of scripture.

However, it would be imprecise to say that the traditionalists rejected all use of reason, for they too were aware of new cases arising: reason and analogy were then to be restricted in their application to preferences expressed when more than one *ḥadīth* was reliably reported from the observing ancestors concerning some question.

The rationalists (rather than a self-description, this term was used by the traditionalists against the "other" camp) advocated for a substantive legal reasoning that for most part does not ground itself in *ḥadīth* as a legal source. [318] Non-reliance on *ḥadīth* was thus central in their position and in the critique launched by the tradtionalists (often a self-

[313] Melchert, *The Formation* (1997), p. 2-7 dealing with the difficulties the categories of "traditionalists" and "rationalists" bring along, as surely traditionalists also brought about a lot of innovation while rationalists surely also founded their understanding of law on ḥadīth.
[314] Melchert, *The Formation* (1997), p. 2.
[315] Melchert, *The Formation* (1997), p. 15.
[316] Melchert, *The Formation* (1997), p. 15.
[317] Melchert, *The Formation* (1997), p. 18.
[318] Hallaq, *Origins* (2005), p. 74.

description) against the rationalists.[319] The traditionalists attacked the rationalists for relying on discretionary reasoning (*ra'y*) instead of *ḥadīth* and purposely changed the meaning of discretionary reasoning (*ra'y*) into ''arbitrary reasoning'' or ''fallible human thought'', i.e., a way of thinking that failed to consider the authoritative texts, which were increasingly acquiring a reputation as a more secure source of legal knowledge. According to the traditionalists, a single Prophetic voice on which all Muslims could rely, was superior to the personal reasoning of individual jurists whose fallibility could be shown by the fact of their widely diverse opinions on any given question.[320] The rationalists, however, rejected as too uncertain *ḥadīths* who had only one transmitter (*akhbār al-āḥād*) that constituted a large part of the traditionalists' jurisprudence, and instead developed complex legal reasoning, in which they adopted the analogical extension of known rules to new cases occupied a central position.

At the risk of falsification through generalization, it might be said that these positions between tradition and reason influenced the later emerging contours of the schools: While the Ḥanafīs were largely considered rationalists, the Mālikīs and Hanbalīs were known as traditionalists, and the later Shāfiʿī's tried to synthesize between these positions. More precisely, however, it needs to be emphasized that many legal scholars found individual ways to integrate combined and modified methodologies into their works. [321] Early writings reveal that legal disputes, and rivalry, on these matters were particularly sharp between the Shāfiʿī's and their principal intellectual adversaries, the Ḥanafīs.[322] By extension, the prime texts on the normative foundations of judicial consultation and their links to legal reasoning analyzed in this work come from Khaṣṣāf, a Ḥanafī, and from Shāfiʿī, eponym of the Shāfiʿī school, each with excerpts of texts that became relevant for their respective school traditions.

[319] Hallaq, *Origins* (2005), p. 74.
[320] Hallaq, *Origins* (2005), p. 74-75.
[321] For a long time, adherents of discretion (*aṣḥāb al-ra'y)* were linked to the jurists of Iraq (*ahl al-'Irāq*) while the adherents of traditions (*aṣḥāb al-ḥadīth)* were linked to the jurists of Medina *(ahl al-Madīna*), methodological opposition would have been only an aspect of an opposition between regional schools. C. Melchert nevertheless showed that this dichtomoy had to be revised. Across the study of three legal works of the third/tenth century, C. Melchert showed that the equation of jurists of Iraq with the adherents of discretion vs. the jurists of Medina as adherents of traditions to a great extent ill founded. J. Schacht had already shown that the Medinese and Iraqis were originally coining the concept of the "Sunna of the Prophet". Schacht, "A Revaluation of Islamic Traditions" (1949), p. 144. Indeed the writings of Khalīfa b. Khayyāṭ and of Ibn Saʿd show the development of circles of supporters of ḥadīth in Medina and Mecca as well as in the Iraqi cities of Kūfa and Basra. This differentiation seems therefore representative of different legal methodologies within regional schools, rather than vis-à-vis regional schools. Melchert, "How Hanafism Came to Originate in Kufa" (1999), p. 346. See also Tillier, *Les Cadis* (2009), p. 144.
[322] Lowry, "Shāfiʿī", OxfordEncyclopedia of Legal History (2010), IV, p. 235.

The question on the sources and methods of law were not only scholarly discussed but also reflected in letters by and for caliphs on the sources to be used in adjudication: The letter of caliph ʿUmar Ibn Al-Khatab to Abū Mūsa al-Ashʿarī (an early companion of the Prophet Mohammed who was governor of Kufa and Basra), probably dating from the beginning of the second century[323], is possibly the first document that mentions that the *qāḍī* must base his judgment on Qur' ān, Sunna, then analogy (*qiyās*).[324] If the letter is not a later back-projection on the sources of the law, caliph ʿUmar could be seen as early an early approval for judges to rely, next to the divinely inspired sources, also on a non-scriptural way to derive the law.

More detailed is another early documentation, the letter of Basran *qāḍī* and legal scholar ʿUbayd Allāh b. al-Ḥasan al-ʿAnbarī (d. 168/ 784-5) to caliph al-Mahdī in 159/775-776. [325] In his letter, Al-ʿAnbarī lays out guidelines for the administration of the Empire regarding four administrative matters: the defence of the frontiers of the state (thughūr), 2) the systematic appointment of judges (*ḥukkām*) and the laws administered by them; 3) the even-handed levying of land tax (*fay'* and *kharāj*), as well as 4) proportional taxation on trade (*ṣadaqāt*). Significantly for this study, al-ʿAnbarī addresses not only questions of appointment of judges but also those of the sources of adjudication. [326] First of all comes the Qur'ān; then it is the Sunna of the Prophet which has to be referred to for the judgments (*aḥkām*); and in case the Sunna too has nothing to offer on the matter at hand, the decision is to be made in accordance with what the leading jurists have agreed upon

[323] On the dating of the letter, see Serjeant, "Caliph ʿUmar's Letters" (1984), p. 78; Serjeant, "Sunna, Qur'ān, ʿUrf" (1995), p. 43. See also Zaman, "The Caliphs, the ʿUlamā', and the Law" (1997), p. 12. Tillier, *Les Cadis* (2009), p. 623.
[324] The letter is cited in full in Khaṣṣāf, *Adab al-qāḍī*, sec. 24, p. 44-45.
[325] On al- ʿAnbarī, see Wakīʿ, *Akhbār al-quḍāṭ*, II, pp. 88-123; Khalīfa b. Khayyāt, *Ta'rīkh*, pp. 457, 462, 470, 472, 473; Ibn Ḥajar, *Tahdhīb*, VII, pp. 7-9. For further references to the sources on him, see the editor's footnote in al-Dhahabī, *Ta'rikh al-Islām*, ed. ʿAbd al-Salām Tadmurī (1987), X, p. 344, n.1. For a brief but illuminating study of al- ʿAnbarī, see van Ess, "La liberté du juge dans le milieu basrien du VIIe siècle (IIe siècle de l'hègire)" (1985), pp. 25-35; further elaborated in idem, *Theologie und Gesellschaft* (1992), II, pp. 155-164.Wakīʿ, *Akhbār al-quḍāt*, II, p. 97-107.
[326] The letter is entailed in Arabic in Wakīʿ, *Akhbār al-quḍāṭ*, II, p. 100-105 (probably as the only source for the letter); a French translation of the ʿAnbarī's letter in Tillier, *Les Cadis* (2009), p. 190. Legal doctrines (and political context) elaborated by ʿUbayd Allāh b. al- Ḥasan al-ʿAnbarī briefly laid out by Tillier, " Un traité politique" (2006), p. 144; van Ess, "La liberté du juge" (1985), p. 28-29, idem, *Theologie und Gesellschaft* (1992) II, p. 167; Zaman, *Religion and Politics* (1997), p. 85-91, Crone/Minds, *God's Caliphs* (1986), pp. 93, 98, 103; Bligh- Abramski, "The Judiciary (Qāḍīs) as a Governmental-Administrative Tool in Early Islam" (1992), pp. 51, 66-67, 70; Tillier, *Les Cadis* (2009), p. 585.

(*mā ajmaʿa ʿalayhi al-aʿimma al-fuqahāʾ*), i.e. with consensus.[327] As an ultimate recourse in case of silence of the previous three sources of law, however, the adjudicator is to have recourse to his interpretive efforts (*ijtihād*), in consultation with the scholars (*ahl al-ʿilm*).[328] Al-ʿAnbarī clarifies that many judicial decisions of his time are not based on Qur'ān or Sunna but rather on the *qāḍī's* independent legal reasoning (*ijtihād*).[329]

Both letters, probably the earliest and only ones by or for the political authorities on sources and methods in adjudication, are important in that they see the necessity for legal reasoning as non-scriptural source of law for adjudication, one in the more confined way of analogical reasoning, the other in the generic term for legal reasoning (*ijtihād*).[330]

This brief overview over the evolving nature of Islamic law and the debates Muslim jurists had about the course of law, showed that Islamic law is more than the delineation of the direct consequences of divine law.[331] The authority of Islamic law is not solely the authority of the text. Precisely in the absence of text, in the face of uncertainty, it is the authority of the jurist that makes authoritative law. This authority was accompanied by ongoing questions over how to construct the foundations of law and which were the

[327] For the use of this, and similar, expressions, which were used before the technical term "ijmāʿ" as consensus came into dominant use, see Ansari, "Islamic Juristic Terminology" (1972), pp. 282 ff.
[328] Wakīʿ, *Akhbār al-quḍāt*, II, p. 101.
[329] Wakīʿ, *Akhbār al-quḍāt*, II, p. 101.
[330] The question of the authenticity of al-ʿAnbarīs letter has been raised with some suspicion. The reference to the four sources theory of Islamic law that the *qāḍī* is to be conform to, is espoused a generation before Shāfiʿī (d. 204/ 820). Zaman, *Religion and Politics* (1997) p. 88-89; On al-Shāfiʿī's hierarchy of the sources of law, see Schacht, *The Origins of Muhammadan Jurisprudence* (1950), pp. 134-136.; Calder, "Ikhtilāf and Ijmāʿ" (1983), pp. 77-79. That it was al- Shāfiʿī who shaped once and for all the future course of Islamic jurisprudence, as Schacht would have it, has been questioned and revised, however, see: Hallaq, "Was al-Shāfiʿī the Master Architect" (1993), pp. 587- 605. Melchert, "The Formation" (1997), pp. 351-366. But al-Shāfiʿī did not invent the four-fold schema compromising the Qurʿān, sunna, and ra'y. A somewhat similar schema (with the absence of consensus, however) occurs in the longer of the two versions of the letter the caliph ʿUmar I is supposed to have written to Abū Mūsā al-Ashʿarī. Serjeant has argued that this version of the letter in fact originated in the early second century A.H., which means that we must also "date [the] existence of the theory on Qur'ān- sunna- qiyās- ra'y to early in the second century A.H.", Serjeant, "The Caliph ʿUmar's Letters" (1984), p. 78. To Wāṣil b. ʿAṭā', the "founder" of the Muʿtazila, is also attributed a four-fold schema of " kitāb nāṭiq wa khabar mujtamaʿ ʿalayh wa ḥujjat ʿaql wa ijmāʿ", these, to him, were the criteria for the discernment of the truth (al-ḥaqq), and he is said to have originated it. Abū Hilāl al-ʿAskarī, *al-Awā'il*, ed. Muḥammad al-Miṣrī and Walīd al-Qaṣṣāb, Damascus (1975), II, p. 135, cited in van Ess, "L'autorité de la tradition prophetique", pp. 213-216, and ibid.: " Le contexte ne laisse pas douter que Wāṣil pense au ḥadīth… L'enumeration correspond au scheme quadripartite des uṣūl al-fiqh classiques, la preuve rationelle tenant la place du future qiyās." Al-ʿAnbarī plea for conformity of the decisions to the Qur'ān, the Prophet's sunna, and the scholar's agreed opinion is thus not exceptional, for it had already surfaced in the thinking of the scholars of the age and milieu to which he belonged. Zaman, *Religion and Politics* (1997), p. 89.
[331] See also Tomeh, "Persuasion and Authority" (2010), p. 143.
[331] See also Tomeh, "Persuasion and Authority" (2010), p. 143.

better hermeneutical approaches to choose. The question whose authority would eventually trump amongst legal authorities that had to make judicial decisions in ambigious or difficult cases thus is intrinsically bound to the status of the law itself.
The science of legal theory (*uṣūl al-fiqh*) was gradually developed to aid jurists in their efforts to extend the scope of the law within and beyond the texts of revelation, particularly for cases ungoverned by the law. Significantly, jurists were conscious that the conclusions arrived at by their interpretive science could only be probable, never certain.[332] Precisely because of the consciousness for the uncertainty in determining the law, the question of authority of legal personae in applying, making the law in the face of uncertainty becomes crucial.

The core part of this chapter (Chapter Two, V.2.) thus is centred right at the heated debates about the making of legal theory in general and the use and scope of legal reasoning in particular. Judicial consultation was evidently particularly pertinent in a legal system that allowed itself so many debates on methodological challenges and "mutual orthodoxies".[333]

III. The Principle of Consultation (*Mushāwara*)

The principle of consultation (*mushāwara*, *shūra,* or *mashwara*) was reflected upon and practiced in both the legal and the political realm.[334] Etymologically, the root term *sh-w-r* as a terminus technicus for consultation means to gain benefit for oneself from soliciting someone else. [335] For the question of judicial consultation, I chose to employ the term *mushāwara* over *shūra* or *mashwara* as the former is the term legal scholar Shāfiʿī used

[332] Fadel, *Adjudication in the Mālikī Madhhab*, (1995), p.220; On probability in Islamic law, see Zysow, *The Economy of Certainty* (1984). For specifically the role of judicial interpretation in the development of Islamic law, see Weiss, "Interpretation in Islamic Law" (1978).
[333] Lombardi/Feener, "Why Study Islamic Legal Professionals" (2012), p. 7. On multiple orthodoxies see also Johansen, *Contigency in a Sacred Law* (1999), p. 1-77.
[334] Badry, *Die zeitgenössische Diskussion* (1998) see in particular examples and analysis of early Prophetic consultation with Companions over military, religious rites, legal and political-administrative concerns, pp. 108-134. Tyan, *Institutions du droit public musulman* (1954), I, pp. 195-198, 396-397, 490; II, pp. 38, 47, 181, 570. Tyan gives a *tour d'horizont* of consultative committees in pre-Islamic times, during the election procedure of the early righteous caliphs, of scholarly writings on consultation as well as its implementation during the later caliphate and sultanate. See also the literature on consultation, especially in the political realm in Lewis, "Mashwara/Mashūra", Encyclopedia of Islam (2), p. 724. On political consultation in Islamic political history see Mottahedeh, "Consultation and the Political Process" (1993).
[335] On the etymological and early historical meanings of the root sh-w-r see Badry, *Die zeitgenössiche Diskussion um den Beratungsgedanken* (1998), pp. 53-66, here p. 54.

as title for his section on the judge soliciting advice from the jurisconsult.[336] *Mushāwara* has the connotation of an expert advice and thus refers to particular professional groups, rather than lay advice.[337] Also, etymologically *mushāwara* means that consultation is requested, i.e. that the counsel-giving side does not initiate or activate his advice.[338] Advising, consulting, and counselling can take many forms, similar to the Latin *consulere*, *consultare*, specifically aimed, however at a decision-making-process.[339]
In this study, extrajudicial authorities will be called jurisconsults, when they are solicited *by* the judiciary or *on* a judicial question (like appointments and removals of judges) – even when they voiced their unsolicited opinion on questions of the law or the judiciary without or against the wish of the judges, i.e. when strictly speaking they are not consulting but imposing their opinion. Also, the giving of a legal opinion (*fatwā*) and judicial consultation (*mushāwara*) on questions related to adjudication are treated equally.

Consultation has an established line of precedence. Consultation is a principle that is pre-Islamic and was practiced in the form of a consultative committee amongst the local peninsulan Arab communities.[340] It acquires its Islamic legitimization through its incorporation into the Qur'ān. Three Qur'anic verses explicitly mention consultation. According to the Qur'ānic verse 3:159, the Prophet is urged to "[c]onsult them in the matter; and when you have decided, place your trust in God". A further Qur'ān verse (42:38) refers to "[The believers] …whose affairs are settled by mutual consultation…". Qur'ānic verse 2:233 requires parental consultation over when to stop breastfeeding the child[341], and because of its private character was barely referred to in the legal literature when discussing consultation in the public realm.

[336] Shāfiʿī, *Kitāb al-umm*, VI, p. 219. Also, the specialists in law that were solicited by the judges in Andalusia and the Maghrib in the beginning of the third/ninth century during this time were officially called *mushāwars*. Tyan, *Histoire de l'organisation judiciare* (1960), p. 222. On consilium, see for instance, Marín, "Šūrā et ahl al-Šūrā dans al-Andalus" (1985), pp. 25-52; Hallaq, *Origins* (2005), p. 89. The Muslim Spanish and Maghribi consilium of jurisconsults sitting on the bench with the judges will not be discussed, as it was geographically located outside the Abbasid reign and territorry. Also, the complexities of authority are less intriguing as the role of the jurisconsults were institutionalized, and the *mushāwar* institution became obligatory so that the the questions of authority are consequentely different.
[337] Badry, *Die zeitgenössische Diskussion um den Beratungsgedanken* (1998), p. 58.
[338] Badry, *Die zeitgenössische Diskussion um den Beratungsgedanken* (1998), p. 55.
[339] Badry, *Die zeitgenössische Diskussion um den Beratungsgedanken* (1998), p. 65.
[340] On pre-Islamic consultation, e.g. Tyan, *Institutions du droit public musulman* (1954), I, pp. 99-100; Watt, *Muhammad at Mecca* (1953), p. 8-10.
[341] For an interpretation and discussion of this verse see Ṭabarī, *Jamīʿ al-bayān*, II, p. 507.

The Qur'ānic verses are not aimed specifically at judges, and the circle of addressees was one of the major points of legal debates. Qur'ānic exegets were concerned from early on with questions on why someone as elevated as the Prophet, guided by God was advised to seek consultation, on whether verse 3: 159 addressed to the Prophet can be extended to other addressees, and whether verse 42: 38 can be extended from the early helpers of the Prophet (*amṣār*) to all believers, and on whether consultation should be sought for worldly affairs or also theological ones.[342]

Next to the normative questions on consultation as entailed in Qur'ānic verses, scholars, mostly theologians, also elaborated on the precedence of Prophetic and caliphal consultation.[343]

Prophetic consultation occurred with his companions, regarding e.g. war prisoners and whether they should be let free or killed[344] and regarding the *ḥadd* punishment (Qur'ānically prescribed, largely corporal) in case of fornication and theft.[345]

Scholars discussed caliphal precedence and gave it particular importance because the first four caliphs were close companions (*tabi'ūn*) of the Prophet and thus called the "righteous caliphs" (*khulafā' al-rashidūn*). There actions were given attention not only as worldly leaders but also as religious ones as they often could attest to the sayings and deeds of the Prophet.The first caliph in Muslim history, Abū Bakr (d. 634 C.E.) consulted with his companions (mostly ʿUmar who became second caliph) on issues of payment of alms tax (*zakāt*)[346] and inheritance rules for maternal grandmothers.[347] Second caliph ʿUmar ibn al-Khaṭṭāb (d. 644 C.E.) consulted with fellow companions on the blood money (*diya*) to be paid for a killed embryo and for a miscarriage.[348] He is reported to have consulted with "the people" (or possibly with fourth caliph ʿAlī) on the application of Qur'ānically prescribed penal punishments (*ḥadd*) for the crimes of

[342] All debates addressed by Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), pp. 66-91, pp.134-144 with extensive references.
[343] Discussions of legal scholars will be pointed out separately at the relevant sections.
[344] Māwardī, *Adab al-qāḍī*, I, pp. 614-614, sec. 1495; Ibn Qudāma, *Mughnī*, IX, pp. 50, 51; Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 120-121.
[345] Māwardī, *Adab al-qāḍī*, I, pp. 259-261, sec. 410; Schneider, *Das Bild des Richters* (1990), p. 99; Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken*(1998) , p. 122.
[346] Bukhārī, *Saḥiḥ*, IV, p. 443; Ibn Taymīyya, *Siyāsa shar'iya*, p.108; Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken*(1998) , p. 122.
[347] Abū Dā'ūd, *Sunan*, III, p. 121-122 (ḥadīth no. 2894), Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken*(1998) , p. 123-124.
[348] Ibn Ḥanbal, *Musnad*, IV, pp. 244, 253; Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken*(1998) , p. 124 with further references.

drinking wine (*ḥamr*)[349], slander (*qadhf*)[350] and fornication (*zina*) of a mentally diseased woman.[351]

Consultation on legal matters after the death of the Prophet primary seemed to have served the purpose of filling up gaps of legal information regarding legal questions already discussed by the Prophet and early caliphs, and only secondly to decide on new cases ungoverned by law.[352]

1. Jurisconsults Consulting Political Authorities

Consultation in the political realm was practiced from early on and has received a lot of scholarly attention.[353] Political consultative or advisory committees generally had an *ad hoc* character, they were initiated every time a question arose that needed the backing of the Muslim community, via its elites.[354] The first caliphs, like ʿUmar ibn al-Khaṭṭāb and ʿUthmān, became caliphs after consultation – in a consultative committee few of the leading men came together to designate ʿUmar, followed by acclamation and swearing of alligance (*bayʿa*), of the people as a whole. While this "council" did not explicitly include jurists with the aim to give their legal opinion, succeeding *mushāwara* councils

[349] Ibn Ḥanbal, *Musnad* III, p. 180, 272-273; Abū Dā'ūd, *Sunan*, IV, p. 163 (ḥadīth no. 4479), Tirmidhī, *Saḥīḥ*, I, p. 272; Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken*(1998) , p. 125.
[350] Malīk b. Anas, Muwaṭṭa', II, p. 171; Badry, *Die zeitgenössische Diskussion* (1998) , p. 125.
[351] Abū Dā'ūd, *Sunan*, IV, p. 140 (ḥadīth no. 4399); Badry, *Die zeitgenössiche Diskussion um den islamischen Beratungsgedanken* (1998), p. 125.
[352] R. Badry concludes that this seems plausible given that at this early time ḥadīths and legal rules were only starting to get written down. She critically adds that the transmission of caliphal consultative practice seems restricted to a few cases, sometimes contradictory and might rather serve to augment the standing of some companions as legal experts as well as a legitimation of certain legal practices. Badry, *Die zeitgenössische Diskussion (1998), p. 126.*
[353] There have been contemporary attempts to re-interpret shūra as a Muslim concept of democracy. See, for example, Ramadan, *Islam, the West and the Challenge of Modernity* (2001), Osman, "Islam in the Modern State: Democracy and the Concept of Shura" (2001).
[354] Because of the *ad hoc* charater, Tyan largely focuses on the "lack of" institutionalization of the consultative principle in Islamic history, Tyan, *Institutions du droit public musulman* (1954), I, p. 195-198, 178, 188. A critique of Tyan's use of institutions and institutionalization was developed by Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 36-38. Except for Muslim Spain and Maghrib, legal consultation was not institutionalized in Sunni legal history either, see Marín, "Šūrā et ahl al-Šūrā dans al-Andalus" (1985), pp. 25-52. Marín excludes that the doctrines of the prevailing Mālikī school of law were the reason for the singularity of the institutionalization of judicial consultation. Rather, though not further specified, she argues for the political and social context that allowed for the *mushāwar* institution.

purposely sought the participation of jurists. Legal opinions were requested by caliphs and governors, as state officials, seeking legitimacy for state actions.[355]

Early Abbasid caliphs sought the advice of jurisconsults, judges, and chief judges on questions of caliphal inheritance rights,[356] international public law[357] and also on policy issues.[358]

Jurists (*fuqahā'*), and judges, also attended the sessions of governors (*wālis*)[359], and possibly affected law and politics also on a regional level.

The following recommendation of Abbasid caliph Harūn al-Rashīd was given to Harthama b. Aʿyan as he was inaugurated governor of Khurasān: "He should make the Book of God a guiding example in all he undertakes and, accordingly, make lawful what is legally allowable according to it and prohibit what is not allowable. When he is faced with anything doubtful and ambivalent in it, he should pause and consult those with a systematic training and acquaintanceship with God's religion and those knowledgeable about the Book of God."[360]

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[355] I am fully aware of the risk of using the term "state" anachronistically, here and at other places throughout the dissertation. The geneology of the term state as an organized community under one rule arguably started during the Renaissance during the 15th and 16th century. On the history of the term "state" within the European legal context, see Dilcher/Quaglioni, *Auf dem Weg zur Etablierung des öffentlichen Rechts* (2011).

[356] Caliph al-Mahdī requested legal opinions from judges and jurisconsults to authorize the abdiction of one descendant of the ruling house at the expense of other descendants. Ṭabarī, *Tarīkh al-rusul*, IV, p. 553 ; Ibn al-Jawzī, *al-Muntaẓam*, V. 335; Tillier, *Les Cadis* (2009), p. 570.

[357] Caliph Harūn al-Rashīd requested a *fatwā* of chief justice Abū Yūsuf on the question of the legality of the killing of the revolting population of Khurasān. The caliph requested several legal opinions, renowned jurist Shaybānī issued a *fatwā* against killing of the revolting population, while judge Abū al-Baj´khtaryi Wahb b. Wahb declared licit the blood of the revolting. Ṭabarī, *Tar'īkh al-rusul*, IV, p. 631 ; Tillier, *Les Cadis* (2009), p. 570-571.

[358] Chief justice Yaḥyā b. Aktham advised caliph al-Maʿmūn against the caliph's intention to not publically curse the Umayyad caliph Muʿāwiyya, Ibn Ṭayfūr, *Kitāb Baghdad*, p. 54; Tillier, *Les Cadis* (2009), p. 570. It was not uncommon that more than one request of consultation was made so that the caliphs could opt for the opinion that suited them best; Tillier, *Les Cadis* (2009), p. 570-574. This practice reflects the normative character of legal opinions as non-binding, attaining validity only when accepted and adopted by the requestor.

[359] Kindī, *Kitāb al-Wulāh,* p. 388.

[360] Ṭabarī, *Ta'rīkh al-rusul*, III, p. 717, translation as in the History of al- Ṭabarī of al-Ṭabarī, XXX, tr. Bosworth, p. 274 (with minor modifications); see also Bligh-Abramski, "The Judiciary as a Government Tool" (1992) p. 209; Crone/ Hinds, *God's Caliph* (1986), p. 89, Zaman, *Religion and Politics* (1997), p. 102. On the instruction for governors to seek the advice of the learned scholars, see also the epistle which Ṭāhir b. al-Ḥusayn, al-Ma'mūn's governor of Khurasan, is said to have addressed to his son on the occasion of the son's appointment as a governor of Diyār Rabīʿa ca. 206/ 821, A l-Ṭabarī, *Ta'rīkh al-rusul*, III, p. 1046-61; translated in *The History of Ṭabarī*, XXXII, by Bosworth, (1987) pp. 110-28. For a brief introduction to this epistle, in defence of its authenticity, see Bosworth, "An Early Islamic Mirror for Princes" (1970), pp. 25-27, Zaman, *Religion and Politics* (1997), p. 105.

The recommendation to seek consultation is very similar to those given to judges. Governors, like judges, might as well encounter difficulties of understanding the Qur'ān and might face local and legal problems emerging from its application.

In fact, another Abbasid governor of Hārūnʿs time, ʿAbd al-Mālik b. Ṣāliḥ, is reported to have written to prominent jurists (*fuqahāʾ*) on how he should respond to an act of aggression and treaty violation (*ḥadath*) by the Cypriots.[361] "The jurists at that time were numerous", Abū ʿUbayd notes, and replicates the response of eight jurists (from the governor's archive (*diwān*), as he informs us).[362] Abū ʿUbayd states that these jurists differed in their opinions and advice, but that those who counselled leniency outnumbered those who stood for retribution. In making up his mind on what advice to follow, the governor would probably have exercised his own reasoning.[363]

In reverse, there are also examples of political authorities refusing to seek consultation. The governor of Medina and Egypt, and in his last year before death also of Syria and Iraq, ʿAbdel al-Malik b. Ṣāliḥ (d. 196-811/2) is reported saying:
"I have never sought the consultation of anyone. He [the solicited] would become big-headed towards me and I would feel degraded towards him. He would feel pride and I would feel humiliation."[364] Similar refusals to seek consultation are also ascribed to caliph al-Manṣūr (r. 136-158/754-75).[365] In these examples, to reject consultation is considered a sign of strength.[366]

2. Jurisconsults Consulting in Judicial Cases

Consultation as found in the books addressed to judges on judicial etiquette (*adab al-qāḍī*) refers to a judge's consultation with experts of law on particular issues or cases. When *mushāwara* includes jurists, then it is almost automatically linked to them giving

[361] Abū ʿUbayd al-Qāsim b. Sallām, *Kitāb al-amwāl*, ed. Muḥammad Ḥamīd al-Fiqī, Cairo, 1353, pp. 171-172 paras 467-474), as cited by Zaman, *Religion and Politics* (1997), p. 87, note 61.
[362] The consulted jurists were al-Layth b. Saʿd, Mālik b. Anas, Sufyān b. ʿUyayna, Mūsa b. Aʿyan, Ismaʿīl b. ʿAyyāsh, Yaḥyā b. Ḥamza, Abū Isḥāq al-Fazārī and Makhlad b. Ḥusayn.
[363] Zaman, *Religion and Politics* (1997), p. 87, note 61.
[364] Nuwayrī, *Nihāya*, VI, p. 78 as cited and translated into German by Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 87.
[365] Nuwayrī, *Nihāya*, VI, p. 78.
[366] Nuwayrī, *Nihāya*, VI, p. 79 where he writes about *istibdād*, rejection of consultation and mentions further examples of Umayyad military general al-Muhallab b. Abī Ṣufra and 6th century minister Buzurghmir refusing consultation. Badry, *Die zeitgenössische Diskussion* (1998), p. 87 with further references.

legal opinions (*fatwās*). Any question posed to an individual learned jurist or a body of jurists and answered by him/her/them, is considered a *fatwā*.
This is different from a *qāḍī* who employs an expert of another field. The *qāḍī* may employ experts, such as those on inheritance questions (perhaps similar to the *iudex non calculate* idea as this expertise required good calculation skills) or those with special knowledge of buildings or women's bodies.[367] This was considered knowledge outside the sphere of the law, knowledge that the judge was not expected to have. In contrast, the question under study here, addresses the legal issues the judge directs to the jurisconsult that fall right in the central field of judicial competency, i.e. knowledge that the judge *qua* judge himself ought to have.

A central aspect of early debates circled on the question of addresses of consultation: Who shall solicit consultation before making a decision? Obviously, the Prophet was the first addressee of revelation. Early Qur'anic exegets focused on the question in how far verse 3: 159, explicitly addressing the Prophet can be extended to others, like judges, or is exclusively meant for the Prophet.[368] Famous scholar and later *qāḍī* of Basra Ḥasan al-Baṣrī (d. 110/ 728) is reported to have argued that the verse, though addressed to the Prophet, is adoptable *in concreto*, and without much explanation, to the judges: According to Baṣrī, the Prophet was in no need to solicit consultation but that he nevertheless did so, so that consultation becomes imitated by judges, so that it becomes a Sunna.[369] The example of the Prophet instructed to solicit consultation shows that even when you are in a most priviledged position of being guided by God[370], consultation is preferable. Seeking consultation is thus not *per se* a question of (inferior) knowledge, to touch upon a question that will be dealt with in greater detail later on.

But the very fact that the Prophet was advised to request counsel continued to cause some debate. Jaṣṣāṣ, the same who commented on Khāṣṣāf's *adab al-qāḍī* work, in his Qur'ānic exegisis (*tafsīr*) asks what purpose would consultation have (addressed to the

[367] These tasks were ususally delegated by the *qāḍī* to specific persons. Schneider, *Das Bild des Richters* (1990), p. 153. Surty, "The Ethical Code" (2003), p. 159.
[368] Ṭabarī, *Jāmi' al-bayān*, IV, p. 152-153. Schneider, *Das Bild des Richters* (1990), p. 108.
[369] Wakī', *Akhbār al-quḍāt*, II, p. 52-53 on the authority of Suyān b. 'Uyayna, Ibn Shubruma, Ḥasan al-Baṣrī; Ṭabarī, *Jāmi' al-bayān*, IV, p. 152-153; Jaṣṣāṣ, *Kitāb aḥkām al-Qur'ān*, II, p. 48; Van Ess, *Theologie und Gesellschaft* (1992), II, p. 45, Schneider, *Das Bild des Richters* (1990), p. 108, Badry, *Die zeitgenössische Diskussion* (1998), p. 88.
[370] Ṭabarī, *Jamī'al-bayān*, IV, p. 152.

Prophet in the Qur'ānic verses) if it would not be needed, as Baṣrī said. For Jaṣṣāṣ, consultation needs to be seriously taken into consideration.[371] If meant only to charm the consultant without giving any effect to their legal opinion on the decision-making result, it could have a detrimental effect on the relationship between advice seeker and giver, and surely not result in respect. This is why Jaṣṣāṣ did not concur with Ḥasan al-Basrī who said the Prophetic examples was there to merely be a role model for the judges, not because the Prophet himself needed consultation. Instead, consultation much rather stood for benefitting from the aid of the opinion of others (*istiẓhār*). As a representative of the rationalists (*aṣḥāb al-ra'y)* who sees the solution not only in text but also in reasoning, Jaṣṣāṣ prefers consultation as means of joint decision-making.[372]
Both Baṣrī and Jaṣṣāṣ established that the Qur'ānic verses applied not only to the Prophet but also to the judge, and Jaṣṣāṣ stressed the need to consult not only as a way to involve others, but also to aid in the decision-finding process.

Political history similarly created preceding normativity. Instructions for the professional group of judges to seek consultation reach back to before the Abbasids, and know a line of caliphal (Umayyad) precedence. In the second/eighth century, Umayyad caliph ʿUmar b. ʿAbd al-ʿAzīz is documented as having announced five qualities of a *qāḍī* which were transmitted to us in two different versions with few divergences. According to the account of al-Jāḥiẓ, the Umayyad caliph would have it that a qāḍī needs to know precedents (*mā qabla-hu*), be unselfish, to show patience (*ḥilm*) with the lititgants, to refer to the authority of the Imams (i.e. caliphs) and, most important to our study, to ask for advice of the scholars. [373]

According to the version of Ibn Qutayba, the *qāḍī* must make inquiries before acting, request the opinion of the scholars, not give in to desire, be just with the litigant and follow the example of the Imams (i.e. caliphs). [374] Though the authenticity of ʿUmar's

[371] Jaṣṣāṣ, *Kitāb aḥkām al-Qur'ān*, II, p. 49-50. Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 78.
[372] Jaṣṣāṣ, *Kitāb aḥkām al-Qur'ān*, II, p. 49-50. Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 78.
[373] Jāhiz, *al-Bayān wa al tabyin*, p. 150, reprinted by Ibn ʿAbd Rabbih, *al-ʿIqd al-farīd*, I, p. 84, as cited by Tillier, *Les Cadis* (2009), p. 187
[374] Ibn Qutayba, *ʿUyūn al-akhbār*, I, p. 101.

letter was later questioned[375], it remains nevertheless of relevance that both transmissions consider the judge seeking consultation as a key quality for the adjudicative profession.

There is evidence of the judge being joined by legal scholars as consultants, perhaps when particularly renowned consultants were part of the adjudication process: When judge Saʿd b. Ibrāhīm (d. 127/ 744-5) took over adjudication in the city of Medina[376], he did so in the presence of two renowned legal scholars next to him, namely al-Qāsim b. Muḥammad (d. 106/ 724) and Sālim b. ʿAbdallāh (d. ca 106/ 724).[377] Similarly judge Muḥāribb d. Dithār (d. 116/734) of the city of Kufa[378] was consultated by al-Ḥakam (b.ʿUtayba, d. 115/ 733) and Ḥammād (b. Abī Sulaymān, d. 120/ 737-8).[379]

Judicial consultation thus knows normative and empirical precedence, and yet still leaves open many questions in its conception and application. The term consultation (*mushāwara*) implies a mutual, bilateral and reciprocal consultative activity, so that one could assume a joint, possibly symmetrical form of exchange of ideas leading to a decision.[380] Yet, judicial *mushāwara* does not seem have the back-and-forth movement of thoughts and ideas that we expect to find in a reciprocal activity[381], at least there is no documention or instruction for the type of dialog they should lead. In how far judge and jurisconsult were meant to jointly deliberate about or whether the judge was rather to unilaterally receive the advice is something we can only speculate about.
As joint deliberation, consultation could be seen as a mutual deliberative process of coming to a consensus, or a means of legitimation in the spheres of politics and law. It could then be also understood as a decentralized, demonopolized participative process that can possibly lead to a consensus. As a unilateral advice, however, it could rather function as a means of control over matters that are of critical importance to the community. But the intriguing question is what if those jointly consulting, however, do not come to a consensus.

[375] Some contemporary scholars question the authenticity of ʿUmar b. Abd al- Aziz' letter, see for instance Cook, *Early Muslim Dogma* (1981), p. 124-136.
[376] Wakīʿ, *Akhbār al-quḍāt*, I, pp. 150-167. He was judge in Medina under caliph Yazīd b.ʿAbd al-Malik (d.724). Wakīʿ though does not mention that Saʿd b. Ibrahīm was consulted.
[377] Ibn Qudāma, *Mughnī*, IX, p. 51. On both these eminent legal scholars see Schacht, *Origins* (1950), pp. 36-39. Badry, *Die zeitgenössische Diskussion* (1998), p. 146.
[378] On judge Muḥāribb b. Dithār see Wakīʿ, *Akhbār al-quḍāt*, III, p. 25-26.
[379] Wakīʿ, *Akhbār al-quḍāt*, III, p 30; Ibn Quḍāma, *Mughnī*, IX, p. 30.
[380] The Arabic prefix *mu-* stands for a reciprocal activity.
[381] Weiss, "Text and Application" (2008), p. 385.

IV. A Joint Burden: Of Interpretation and Adjudication

The burden of interpreting Islamic law is a reoccuring theme in Islamic legal scholarship. This is not surprising given the law's character of *ius divinum* that needs human interpretors to make the law legible. Thus for Muslim jurists, interpreting and adjudication the law were embedded between warnings and collective duty: The difficulty to interpret and apply the law, particularly in situations of indeterminacy, stands in tension with the necessity to interpret and apply the law as a way of ordering society and of dispensing justice. It is this delicate balance within which the rational for consultation should be seen.

This is particularly highlighted by the role of the judge who makes binding and enforceable decisions with automatic consequences for the litigants. Therefore, it is typical for early literature on adjudication starts with both a lauding and a cautioning of the judgeship position. The earliest collections of *ḥadīths*, biographical dictionaries and judge's anecdotes recorded in numerous chronicles related to judicial theory and practice included in their chapters on adjudication (*al-qaḍā'*) traditions that both encouraged the adjudicator to dispense justice while at the same time reminded the judge of the responsibilities before God, and the eschatological dangers that an unjust *qāḍī* risked running into.[382]

Wakī ʿ in his seminal judicial chronicle 9th century "Akhbār al-qūḍāt" (Reports of Judges) dedicates the first chapter to the *ḥadīths* attributed to the Prophet or the Companions which circulated in his epoch on this subject. They focus on the dangers of adjudication and specify the spiritual threat weighting heavy on the *qāḍī*, as the following *ḥadīth* reports:

"There are three types of judges: two are in Hell, one is in Heaven; the two [types] in Hell are those who are learned and judge against their knowledge, and those who are ignorant and judge without knowledge; the [type] in Heaven is learned and judges from his knowledge."[383]

[382] See also Rebstock, "A Qāḍī's Error" (1999), p. 3. Tillier, *Les Cadis* (2009), p. 626. See also, symbolically, judge ʿAmr b. Sālem on his ring was engraved "ʿAmr b. Sālem fears that if he disobeys God he awaits punishment in the Hereafter", Wakīʿ, *Akhbār al-quḍāt*, II, p. 307.

[383] Al-quḍāt thalātha fa qāḍiyān fi al-nār wa qāḍin fi al-janna. Wakīʿ, *Akhbār al-quḍāt*, I, p. 13-19; Khaṣṣāf, *Adab al-qāḍī*, sec. 5, p. 33; al-Tirmidhī, al-Sunan, III, p. 613; Abū Dā'ūd, *al-Sunan*, III, p. 299;

This tradition includes a clear warning and a threat of sanction for the judges in the Hereafter, once they would be judged themselves. The chances of two to one ending up in hell when judges did not fulfil the expectations to judge according to what they know of the law, made adjudication barely a promising but rather a perilous undertaking.
Similarly, there are reports of the *qāḍī* finally facing God on the day of judgment, hands tied to the neck, or thrown into paradise by an angel. [384]
Another much cited *ḥādīth* is "Who is made judge is slaughtered without a knife". [385] It indicates that the metaphorical death of the judge is closely linked to moral responsibility that comes with his profession. These *ḥadīths* spread probably under the influence of some traditionalists who invited suchlike *qāḍīs* to apply law rigorously without giving in to the pressures of power, leading to corruption or unsound verdicts, and reminded judges that they were responsable before God and not before the governments. This way, they possibly wanted to hold back those from *qāḍī* office who were not considered suitable for the task, or burden, of adjudication.[386]
The very fear of legal malpractice was also captured in the following *ḥadīth*: After the judge (*ḥakam*) had died, every legal decision of his is presented to him in his grave; and if any anomaly (*khilāf*) is found, then he is beaten [so hard] with an iron rod that his grave coughs."[387]

The discussions included not only the perils of the *qāḍī* position but also their countervailing significance. These dual qualities consist, on the one hand, of a firm societal obligation (*farḍ kifāya*) to produce adjudicators of Islamic law, and on the other, an acknowledgment that engaging in this type of interpretation inevitably exposes the *qāḍī* to the possibility of (divinely punished) error.

Ibn Māja, *al-Sunan*, II, p. 776. Tillier, *Les Cadis* (2009), p. 627; Ibn Qudāma, *'Udda*, XI, p. 225 and al-Māwardī, *Adab al-qāḍī*, I, p.638 ascribed a variant to the Prophet. Rebstock, "A Qāḍī's Error" (1999), p. 17.
[384] Wakīʿ, *Akhbār al-qudāt*, I, p. 19-21; See Ibn Abī Shayba, *al-Muṣannaf*, IV, p. 540;VI, p. 419; Ibn Ḥanbal, *al-Musnad*, I, p. 430; Ibn Māja, *al- Sunan*, II, p. 775. Further on these ḥadīths see Tyan, *Organisation judiciaire* (1960), p. 322. Tillier, *Les Cadis* (2009), p. 627.
[385] *Man ju'ila qāḍi-an fa qad ḍubiḥa bi ghayr sikkīn*, Wakīʿ, *Akhbār al-quḍāt*, I, p. 7-13; al-Kindī, Al-wulāt wal quḍāt, p. 471. See Ibn Abī Shayba, *al-Muṣannaf*, IV, p. 542; Ibn Ḥanbal, *al-Musnad*, II, p. 230, 365; Abū Dā'ūd, *al-Sunan*, III, p. 298; al-Tirmidhī, *al-Sunan*, III, p. 614; Ibn Māja, *al-Sunan*, II, p.774; Khatībī, *Tar'īkh Baghdad*, VI, p.151; Tillier, *Les Cadis* (2009), p. 626.
[386] Schneider, *Das Bild des Richters* (1990), p. 182.
[387] Wakīʿ, *Akhbār al-quḍāt*, I , pp. 31-32, on this *qāḍī*, see Ibn Ḥajar, *Tahdhīb*, VIII, p. 226 (nr. 418), p. 236, as cited and translated by Zaman, *Religion and Politics* (1997), p. 154.

Parallel to these warnings, early literature also dealt with the communal obligation (*farḍ kifāya*) of adjudication, as a task that serves the community, was a collective duty upon the community and as such irrenounceable.[388] Adjudication was considered communal as the office of the judiciary had the aim to do justice by ensuring that people are accorded the rights to which they are entitled. The judge not only had to interpret laws that originated in revelation, but also had to decide cases in order to maintain public order. These two central aspects, terminating litigation through a decision based on revelation and securing public order were central elements of adjudication as accepted by all schools of law. [389] Thus, despite the warnings against the risks of getting it wrong in adjudication, the office of *qāḍī* was overall approved of as a general good.

The communal obligation is also reflected in the title of "*qāḍī al-muslimīn*"[390], *qāḍi* of the Muslims and at the service of the Muslims, and not of the ruler as shown by "qāḍī amīr al-muʿminīn," (judge of the Commander of the Faithful, i.e. judge of the caliph) as a title that was also in circulation, albeit much more rare.[391] *M. Tillier* proposes not to translate the *qāḍī* title as the term "judge of the Muslims" (in the sense of excluding non-Muslims), but judge of the Muslim people, in opposition to the ruling power. For him, the term stresses the relationship of the judge with the people, and that the judge was bound by the laws of the Muslim people.[392] More precisely though, Muslim judges did not only adjudicate cases of Muslim litigants but of all those subjects in the Empire that sought their services, regardless of their religion: Muslim judges also gave rulings over Christian litigants, when asked to. In a judicial chronicle by Kindī it was asked if judge Khayr b. Nuʿaym used to adjudicate for the Christians on the doorsteps of the mosque. The recorded answer was that all judges reserved a day in their homes for the Christians. Kindī then added that the first to have Christians enter the mosque for their litigations was Muḥammad b. Masrūq, a Ḥanafī judge from the Iraqi city of Kufa, who was appointed judge of Egypt by caliph al-Rashīd under in 177 A.H.. [393] The passage refers not only to Christians as litigants before Muslim judges, but also to the changing place of adjudication, shifting gradually from the judge's home to the mosque. The place of adjudication for Christians thus cannot be per se understood as a a different treatment but

[388] Masud/ Peters/Powers, *Dispensing Justice* (2006), p. 19.
[389] Al-Zuhayli, *Ta'rikh* (1995), p. 11-19. Rebstock, "A Qāḍī's Error" (1999), p. 2.
[390] See for instance, Shāfiʿī, *Kitāb al-umm*, IV, p.61.
[391] Tillier, *Les Cadis* (2009), p. 616-620.
[392] Tillier, *Les Cadis* (2009), p. 619.
[393] Kindī, *Kitāb al-Wulāh*, p. 390.

rather reflects a changing conception of what the right place of adjudication is, a debate assessed in Chapter Four regarding the bureaucratization of the judiciary as an official duty, reflecting aspects of communality and (religious and worldly) accountability of judging in the mosque.[394]

Many qualified potential candidates either refused to accept the judgeship position or had to be pressured into office. For instance, *qāḍī* Qāsm b. Maʿn was threatened with seventy-five strikes before he eventually accepted his appointment as judge.[395] His predecessor, *qāḍī* Sharīk (96-177 or 179, 711- 793/795) tried to negotiate himself away from *qāḍī* position by telling the caliph that he had bad mouth smell, to which the caliph replied he should simply chew a gum.[396] Famously, Abū Ḥanīfa, school eponym of the Ḥanafīs, was said to have endured torture and imprisonment for his refusals to become *qāḍī,* even before the reign of the Abbasids.[397] The well-known reluctance of scholars to accept appointments was possibly linked to them not wanting to associate themselves with an unjust, impious or illegitimate state power[398], a theme reoccurring regardless of the actual rulers in power. *M.Q. Zaman* however argues that the reports of not accepting official appointments or of pious distrust of associating with the rulers must be assessed with caution.[399] It does not follow from such attitudes that the scholars who held them considered the state, or its rulers, to be illegitimate[400]: "to be wary of the corrupting influences of power is not the same thing, after all, as regarding power itself to be illegitimate". [401] Nor does the refusal to become a *qāḍī*, for instance, necessarily signify a disapproval of the concrete ruling power: there were stories about the position of the judge being declined even in the time of the pious caliphʿUmar I.[402] Thus it is not without interest to note that at least some of the persons listed in the chain of transmitters

[394] On (failed) codification, Chapter Four, II.
[395] Wakīʿ, *Akhbār al-quḍāt*, III, p. 177.
[396] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 174.
[397] For a discussion of this and his antipathy toward the ruling authorities and censure of judges like his rival Ibn Abī Laylā who cooperated with them, see Yanagihashi, "Abū Ḥanīfa," *Encyclopedia of Islam* (3). For more on the ambivalent relationship of scholars, such as Abū Ḥanīfa's, with the state, see Chapter Four, III.1.c. and d.
[398] Zaman, *Religion and Politics* (1997), p. 154. Masud/Peters/Powers, *Dispensing Justice* (2006), p. 10.
[399] Zaman, *Religion and Politics* (1997), p. 154.
[400] See Crone, Slaves on Horses (1980), pp. 61-3, on the scholars regarding the state as illegitimate. However, Crone does not *in concreto* refer to the refusal of scholars to accept official, or judicial, appointments.
[401] Zaman, *Religion and Politics* (1997), p. 154.
[402] Kindī, *al-Qudāt*, p. 302; Wakīʿ, *Akhbār al-quḍāt*, I, p. 16, Khoury, "Zur Ernennung von Richtern" (1981), p. 203.

(*isnāds*) of *ḥadīths* which warn of the perils of the *qāḍī's* position, were themselves judges.[403]

The *hādīths* offer additional interpretations: *van Ess* considers that these *ḥadīths* reflect a part of social reality in Iraq of the second/ eighth century. The circulation of these traditions would express tensions comparing some non-Arab (*mawālī*) scholars and the Arab *qāḍīs* who had tendency to treat them disrespectfully in the course of trials: "The scholars took their revenge by making comments on the ignorance of some of those that managed law officially. They turned to the responsibility of the judge and underlined the fact that a wrong judgment, arrived to it by bad will
of the *qāḍī* or his lack of competence, could cost him his salvation."[404]
Another interpretation was offered by *Wensinck*, who favors the motif of "refused dignity" in which not only prophets but also judges refused their appointments, so that their acts could be seen as humility and discretion, ultimately raising the public standing of judges. [405]
M. Tillier offers an additional approach. He principally sides with the interpretation of stressing the judge's responsibility to dispense justice, and the *ḥadīths* being employed to scare those who do not feel firm enough for adjudicative practice and the burden of justice. He argues that it is also plausible that these traditions serve to elevate the position of the judges. More than anything, these *ḥadīths* link *qāḍīs* directly with divinity.[406] It is

[403] For the tradition "one who is made a judge, is slaughtered without a knife", such individuals include: ʿAbd al-ʿAzīz b. ābān (d. 207/ 822-3), *qāḍī* of Wāsit (Wakīʿ, *Akhbār al-quḍāt*, I, p.12, on him, see *Tar'īkh Baghdad*, X, pp. 442-447); Ibrāhīm b. Muḥammad al-Taymī (d. 250/ 864), qāḍī of Basra, Khatīb al-Baghdadi, *Ta'rīkh Baghdad*, VI, p. 151; on him ibid., pp. 150-152); Ismāʿīl b. Isḥāq (d. 282/ 895) (Wakīʿ, Akhbār al-quḍāt, p. 9; on him Khatib al-Baghdadi, *Ta'rīkh Baghdad*, VI, pp. 284-90); and perhaps others. Another tradition on the perils the *qāḍī* is exposed to features Muʿādh b. Jabal (d. 17-18/ 638-39), the Prophet's Companion who is said to have been sent as *qāḍī* to Yemen, and Shurayḥ (d. 78/697), the legendary *qāḍī* of ʿUmar I, see Wakīʿ, *Akhbār al-quḍāt*, I, pp. 19-20.; on Shurayḥ, see Tyan, *L'Organisation* (1960), I, pp. 101-103. Sharīk b. ʿAbdallāh (d. 187/ 803; on him, Khatib al-Baghdadi, *Ta'rīkh Baghdad*, IX, pp. 279-295) appears in variants of the tradition which states that two out of every three qāḍīs are in hell (Wakīʿ , *Akhbār al-quḍāt*, I, pp. 13-15.; on Sharīk b. ʿAbdallāh, see ibid., III, pp. 149-75); and ʿIsā b. Hilāl al-Ṣālīḥī, a third century (?) qāḍī of Ḥimṣ figures in the isnād of a tradition which states that "after the judge (ḥakam) had died, every legal decision of his is presented to him in his grave; and if any anomaly (khilāf) is found, then he is beaten [so hard] with an iron rod that his grave coughs" (Wakīʿ, *Akhbār al-quḍāṭ*, I, pp. 31-32, on this qāḍī, see Ibn Ḥajar, *Tahdhīb,* VIII, p. 226 (nr. 418), p. 236). So these traditions did not make people averse to occupying the position of judge. Zaman, *Religion and Politics* (1997), p. 154.
[404] van Ess, "La liberté du juge basrien" (1985), p. 27.
[405] Wensinck, "The refused dignity" (1922), p. 492.
[406] Tillier, *Les Cadis* (2009), p. 629 refering also to some of the ḥadīths Wakīʿ cites linking the awards of adjudication with satisfying God.

the law which they have to apply and it is for its application they will have to be accountable.

Whether these warning *ḥadīths* are indeed authentic is yet another question that is is difficult to ultimately answer. *M.Tillier* goes back to trace the origins and the circulation of these *ḥadīths*, trying to find out by whom and with what credibility the *hāditha* were being put into circulation. [407] Significantly though, while most explanations about the authenticity and origins of these ḥadiths remain speculative, the very fact that they circulated and were included in all literature on adjudication nourishes the fact that they were given some thought and considered a relevant piece of information for the coming generations of judges.

The debate about cautioning the judge on the judgeship position is important in a significant way: The judge cannot deny, cannot refuse to recognize the truth about extralegal factors, or about his own desire, emotion, opinion, or intention, and this is precisely why he feels, or ought to feel the painful anxiety about judgeship.[408] These are exactly the extralegal factors addressed by the literature of *adab al-qāḍī* (Etiquette of the Judge) that are central to this genre.[409]

These reports and the scholarship cautioning the judges point to the jurists' growing awareness of the twofold vulnerability of a *qāḍī*, of material and moral temptations as possible sources of injustice.[410] Externally, there were the potential pressures of power, assuming the *qāḍī* to be an instrument of the highest powers of the state, and an object of corruption and bribery on the part of the litigants. [411] Internally, there was the fear of dispensing justice and of commitig an error (or sin) – consequences of the consciousness that the judge was fallible and subject to the law, in this world and in the Hereafter.[412]

[407] Tillier, *Les Cadis* (2009), p. 627-629.
[408] Duncan Kennedy describes the opposite for the US-American context: Most judges in the USA, he says, are engaged in denial, refusing to admit that they are subjects to extralegal factors such as desires or emotions, with the aim to prevent or get rid of exactly the anxiety as documented in Muslim legal literature. Kennedy, "Judicial Ideology" (1996), p.806. On the idea that the legal actors in a given legal culture can engage in collective denial with respect to the true nature of legal institutions is one with a long pedigree in legal history and sociology, see Kennedy, "Judicial Ideology" (1986), p. 813, referencing Maine, *Ancient Law* (1861), p. 76-77.
[409] On the *adab al-qāḍī* literature and the anxieties of adjudication, Chapter Two IV.1.
[410] Coulson, "Doctrine and Practice" (1956), p. 212; Rebstock, "A Qāḍī's Error" (1999), p. 13.
[411] Wensinck, "The refused dignity" (1922) p. 497.
[412] Rebstock, "A Qāḍī's Error" (1999), p. 13.

Yet, all these warnings against adjudication need to be counter-balanced with a particularly prominent *ḥadīth* that encourages all jurists in engaging in *de lege artis* of legal reasoning. The *ḥadīth* counters the dangers of adjudication and simultaneously underlines the significance of any jurist's consciousness in dealing with juridical law-making: "If a jurist exerts efforts and arrives at a correct ruling, he will be rewarded twice. If he arrives at an erroneous ruling, he will be rewarded once."[413] The tradition applies to anyone who exercises the art of interpreting the law, and thus applies to all qualified judges and jurisconsults. Jurists were likely to make errors and to become culprits of injustice, but this *ḥadīth* shows that unintentional error was not to be sanctioned. The report encourages jurists to exercise their legal reasoning. It also signals that there existed a consciousness for the risks and dangers of juridical law-making, yet focuses on the sound efforts, and less on the actual result, promising reward in both the correct and the erroneous result. For the judge this means that the burden of adjudication, first elevated to raise consciousness of what it means to dispense justice, was mitigated again: adjudication *lege artis*, as difficult as its methods might in itself be, can be a reward-bringing undertaking.

For jurisconsults, the *adab al-muftī* literature, which only emerged in the 10th century and thus around two centuries later than the literature on judges[414], also emphasized caution for *muftīs*: There is a strikingly parallel discussion of underlining the communal obligation to produce interpreters of the law, and a simultaneous consciousness and acknowledgement of the perils of error in interpretation.[415]

Despite their nonbinding and informational qualities, *fatwās* often had a significant impact on the law, and it is in this light that *Masud*, *Messick* and *Powers* suggest that the "burden of the *muftī* as a human interpreter of God's law may be seen as even greater than that of the judge".[416] This statement is contested by *Rebstock* who recalls that "the *qāḍī's* judgment had to be just in a social sense, true in a religious sense, and correct in a

[413] Abu Dawud, *Sunan*, III, p.1013, hadith no. 3567; Al-Bukhari, *al-Sahih,* VIII, p.157.
[414] On *adab al-muftī* (the etiquette for jurisconsults) and possible reasons for its late emergence, see Chapter Four III.2.e.
[415] Masud/Messick/Powers, *Islamic Legal Interpretation: Muftis and Their Fatwas and* (1996), p. 15 refering to 13th century Shafiʿī scholar al-Nawawi, *Adab al-fatwā,* p. 13-14.
[416] Masud/Messick/Peters, *Islamic Legal Interpretation: Muftis and Their Fatwas* (1996), p. 19 refering to14th century scholar Ibn al-Qayyim al-Jawzīyya, *I'lām al-muwaqqi'in*,I, p. 38;

formal sense."[417] He disputes the statement of the *muftī's* burden in interpreting Islamic law and instead argues that "[t]he legitimacy of his [the judge's] judgment rested on his correct application of prescriptions that were regarded as being of divine origin. This responsibility put him into a singular position within Islamic society. No one else, not even the caliph, was burdened with this responsibility."[418]

The contest of burden in interpreting the law of these two legal personae is key for what I would like to argue: There is not only the burden of adjudication but also the burden of issuing legal opinion, or in short, the burden of interpretation. In both cases, there was a moral anxiety about getting it wrong, about risking a legal malfinding. Judicial consultation, I argue, is thus a form of judicial risk distribution. Even though there is reward promised for the efforts of interpretive reasoning, even when not getting it right, there is "anxiety produced by the dilemma of not being able to do the right thing no matter how hard you try." [419]

With both judge and jurisconsult interpreting the law, and risking errors, could judicial consultation entail a possible conception of shared juridical responsibility? After analyzing questions of *who* and *when* of consultation more detailed, we will return to this question of judge and jurisconsult distributing the juridical, and judicial, risk.[420]

V. On Adjudication and Consultation: *Adab al-Qāḍī* Literature (The Etiquette of the Judge)

To re-construct the normative authority of legal personae, the *adab al-qāḍī* literature (literally etiquette of the judge) offers a precious perspective upon the judge's relationship with his surrounding legal and social communities, including the jurisconsult. In this sense, the *adab al-qāḍī* literature is the earliest available normative literature to offer keys into the question of authorities and hierarchies of legal personae of Islamic law.

[417] Rebstock, "A Qāḍī's Error" (1999), p. 2.
[418] Rebstock, "A Qāḍī's Error" (1999), p. 2-3.
[419] Kennedy, "Judicial Ideology" (1996), p. 816.
[420] See School Comparisons and Conclusions in this Chapter Two, V.2.c.

1. The Genre

The *adab al-qāḍī* genre depicts an overall sophisticated etiquette (*adab*) that is required of the judge as a distinguished figure of public life who was advised to be aware of his responsibilities in adjudication, towards the community, and before God. Recommendations of social (e.g. which societal invitations to accept or decline), psychological (e.g. not to judge while in a state of anger, thirst, hunger, etc.) and procedural types (e.g. how to lead court session, hear litigants, and examine the facts of the case, etc.) were given to the judge to conduct himself appropriate to his public position.[421] The genre thus addresses both extralegal and legal factors that are key in a inclusive analysis of adjudication.

The genre typically contains the requirements and qualifications for judgeship and the rules and ethical norms governing its practice in matters of court procedure, litigation, judgment, and successor review.[422] It addresses judicial questions such as which inaugural procedure to follow when a judge assumes office, how a court session (*majlis*) should be conducted, the composition of the court, its personnel and the place in which court sessions should be held, procedures for hearing complaints and for conducting hearings involving witness testimonies and evidence, the methods to arrive at a legally sound judgment, as well as the conditions for judicial consultation (*mushāwara*). While the *adab al-qāḍī* works mainly focus on the role of the judge, they also contain some information on the role of the jurisconsult, mainly to distinguish it from that of the judge. It is a genre that is rich in normative information and casuistry, often simultaneously discussing substantive and procedural questions of law. The casuistry in Khaṣṣāf's *adab al-qāḍī* treatise, for instance, to which we soon will come in detail, focuses on the laws of family, inheritance and property- most likely as those fields that were part of the judge's daily judicial practice. Excluded are the fields of criminal law (*ḥadd*, *ta'zīr*), tax law (e.g. *jizya tax*), and international public law (*siyār*). As litigation was bound to the

[421] On the types of recommendations given to judges, see Schneider, *Das Bild des Richters* (1990), pp. 140-173, particularly pp. 144-147, 173.

[422] Until today, the only systematic study of this genre is that of Schneider, *Das Bild des Richters* (1990), focusing on the qualifications of a *qāḍī*, his appointment and removal, court procedure, and the *qāḍī's* relationship to the ruler. Fyzee, "Adab al-Qāḍī" (1964), and Ziyada, Khaṣṣaf *Adab al-qāḍī*, Introduction, (1978), have studied single *adab al-qāḍī* texts of the Ismaʿīlī respectively Ḥanafī school. Tyan in his *Histoire de l'organisation judiciare* (1960) used the *adab al-qāḍī* literature to sketch a static and ahistorical judiciary and did not convey the many variations that were due to the authors' school affiliation, geography and time. Masud/Peters/Powers, *Dispensing Justice* (2006) edited a collection of articles on the *qāḍī* in the many periods of Islamic legal history. In their introduction, they offer a brief, but concise survey of the *adab al-qāḍī* literature, pp.17, capturing the very characteristics of this genre.

strict rules of evidence (*shahāda*) it was considered not possible for the *qāḍīs* to undertake criminal investigations, and the political authorities transferred control over most criminal justice responsibilities to the police (*shurṭā*) and the military governors. Administrative transgressions were referred to the court of investigation of complaints (*maẓālim*).[423] Jurisconsults were not confined by any such jurisdictions and could, in principle, be solicited to issue a legal opinion by any of these judicial instances.[424]

The early Ḥanafī and Shāfiʿī schools of law, considering each other principal intellectual adversaries, were the first to come forth with prominent writers of *adab al-qāḍī* literature starting in the late 2nd/8th century. Ḥanafī jurists and judges were arguably the firsts to write on the conduct of judges. [425] This interest can be explained by the Ḥanafī early rise and their dominant presence in the early Abbasid judiciary.[426] The early Ḥanafī dominance in the judiciary also explains their hightened interest in the early authoring of *adab al-qāḍī* works. Thus, it is no coincidence that a substantial number of (mostly Ḥanafī) *adab al-qāḍī* authors also were judges.[427] Khaṣṣāf, whose seminal *adab al-qāḍī* work is presented in more detail, was possibly a judge, but for sure was a jurist, possibly a jurisconsult, and prolific author of legal texts who issued legal opinions.[428]

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[423] Bligh-Abramski, "The Judicary as a Government Tool" (1992), p. 208-209. See also Chapter Four I.2.a.bb. on further legal actors within the Islamic system.

[424] See Chapter Four III.3. where the scope of the *muftī's* activities is defined precisely by wide competence and not by jurisdictions.

[425] See the bibliographers and scholars Ibn Nadim (d.385/995), Ḥajjī Khalīfah (d.1067/1657). According to Ibn al-Nadīm's (d. 385/995) bibliographical survey Al-Fihrist, the first Ḥanafī author of *adab al-qāḍī* was judge Ḥasan b. Ziyād al- Lu'lu'ī (d. 204/819 or 829), whose work is no longer extant (Ibn al-Nadīm, 1970, I, p. 201). Ḥajjī Khalīfa's (d. 1067/ 1657) bibliographical work considers Abū Yūsuf (d. 182/ 798), the first chief judge of the Abbasid Empire, the first author of the genre Ḥajjī Khalīfa, Kashf, p. 219. His work is not existant either, but Khaṣṣāf quotes from this book (sec. 275), explicitly mentioning the title. Also, Muḥammad al-Shaybanī (d. 189/805), famous jurist, colleague of Abū Yūsuf later judge first in Raqqa (Iraq) and later in Khuraṣā (Iran) under caliph Harūn al-Rashīd, has also written on *adab al-qāḍī*, quoted several times by Khaṣṣāf. In the ninth century, judge Ibn Samāʿa al-Tamīmī (d. 233/847; on him see al-Nadīm 1970, II, p. 508), al- Khaṣṣāf (d. 261/874, see analysis in this chapter) and Al-Qaysī (d. 278/891) were also among the firsts. See also, Schneider, *Das Bild des Richters* (1990), p. 149.

[426] Tsafrir, *The History* (2003), p. 28. See Chapter Four, I.1.b. and Chapter Four II.1.e. for a detailed discussion of Ḥanafī presence in adjudication and spread of Ḥanafī thought in scholarship.

[427] Amongst the earliest authors that also were judges are Ḥasan b. Ziyād al-Lu'lu'ī (d. 204/819), GAS, I, p.433; Abū ʿUbayd al-Qāsim (d. 223 oder 224/ 837), see GAL G.1., p. 106ff, S.1., p. 166-167; Ibn Khallikān, *Wafayāt*, IV, p. 60-62 on al-Qāsim's *adab al-qāḍī* work; Abū Ḥāzim al-Qāḍī (d. 292/ 905), al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, XI, p. 62-64, Ibn al- Qāṣṣ (d. 335/ 946), GAL G.1, p. 180; S.1, p. 306; GAS, I, p. 496-497. For an extensive list of *adab al-qāḍī* authors who also were judges, see Schneider, *Das Bild des Richters* (1990), p. 171; El-Shafi, "Judicial Training" (2003), p. 182.

[428]Ibn Abī al-Wafā', *Al-Jawahir* , I, p. 142; Concise overview of Khaṣṣāf's biography see See Hennigan, *The Birth of an Institution* (2004), p. 5.

Shāfiʿī jurists started into the judiciary only around 200 years after the Ḥanafīs (i.e. around the 4th/10th century), and thus barely any *adab al-qāḍī* works from the early Abbasid period exist. However, Shāfiʿī himself (d. 820), eponym of the school, authored a piece on the etiquette of the judge within his renowned legal compendium Kitāb al-umm (*The Exemplar*) that became the model explanations in this field for his school. Once judges with Shāfiʿī school affiliation became increasingly appointed to the judiciary, their interest in authoring *adab al-qāḍī* treatises visibly rose.[429] The link between this judicial genre and judicial practice thus can be evidenced.[430]

Other schools of law, like the Mālikī or the Hanbalī, did either not author *adab al-qāḍī* works because they cautioned against the burden of adjudication and/or where not influential enough to have their jurists attain judicial positions.[431] This (lack of) literature explains why this study largely focuses on Ḥanafī and Shāfiʿī elaborations.

Shāfiʿī's legal compendium Kitāb al-umm shows that *adab al-qāḍī* has emerged as a part of Islamic legal literature not only in monographic treatises like Khaṣṣāf's renowned Ḥanafī treatise on *adab al-qāḍī* but also in the books of substantive law (*fiqh*) were *adab al-qāḍī* are dealt with next to the laws of rituals (*ʿibadāt*) and substantial law (*furūʿ*). It

[429] In fact, early Shāfiʿī jurists barely produced any thoughts on the *adab al-qāḍī*. Shāfiʿī's explanations were were followed only by Al-Iṣṭiḥārī (d. 300/913), almost one hundred years after Shāfiʿī. He is followed by Muḥammad al-Qaffāl al-Shāshī (d. 395/976). *Schneider* thus argues that a Shāfiʿī *adab al-qāḍi* tradition started as late as in the fourth/ tenth century, precisely when the Shāfiʿī school of law took its definitive contours: Just when the second Shāfiʿī author al-Iṣṭahrī issues his *adab al-qāḍī* work at the end of the third/ninth century, the first appointment of the Shāfiʿī judge, Ibn Surayi (d. 306/918) occurs (Schneider, *Das Bild des Richters* (1990) p. 150-151 with further references.The Shāfiʿī's thus made significant contributions to the development of the *adab al-qāḍī* genre in parallel to their development of school doctrines. Earlier shorter texts entitled *adab al-qāḍī* written by al-Shāfiʿī (d. 204/820), al-Qāsim ibn Sallām (d. 224/ 839), Ibn al-Ḥaddād al-Miṣrī (d. 354/965), al-Māwardī (d. 450/ 1058). See El-Shafi, "Judicial Training" (2003) p. 182 refering to Ibn Abi Dami Al-Hamawi's *Adab al-Qaḍī* (ed. Mustafa Zuhayli), Damascus 1975.

[430] Schneider, *Das Bild des Richters* (1990), p. 151.

[431] Mālikī and Ḥanbalī works of *adab al-qāḍī* were rare but existed as well. The Mālikī school produced works despite the bibliographies of Ibn Nadīm and Ḥajjī Khalīfa not mentioning any Malikī works. The early work of Abū ʿAbd Allāh Aṣbagh ibn al-Farraj (d. 225/ 839) is not extant anymore. He was followed by Ibn Shabtūn al-Lakhmī (d. 321/924), El-Shafi, "Judicial Training" (2003),p. 182. Ḥabīb b. Naṣr b. Sahl (d. 287/900), student of legal scholar Saḥnūn und chief justice of the petitions court (*mazālim*) at Qayrawān (Morrocco), solicited legal opinions from leading legal scholars Saḥnūn (d. 240/ 854) or Ibn ʿAbdūs (d. 260/ 870). These legal questions (*masāʾil*) were compiled by Ibn Saḥnūn (d. 256/870) in a book with the titel adab al-qāḍā' resp. al-quḍāh. Ḥabīb b. Naṣr himself has also compiled his questions to Ibn Saḥnūn in the book *Kitāb al-aqḍiya*. Muranyi, *Materialien* (1984), p. 65, 80; Schneider, *Das Bild des Richters* (1990), p. 150-151; Surty " the Ethical Code" (2003), p. 150.
The Hanbalī *adab al-qāḍī* works started appearing in legal *(fiqh)* compendia in the mid 4th/10th century, see Ḥirāqī (d. 339/945), *Mukthaṣar*, pp. 226; Ibn Qudāma (d.620/1223), *Al-Mughnī*, IX, pp. 34; Ibn Qayyim al-Jawziyya (d. 751/1350) *Ṭuruq al-Ḥukmiyya fi'l Siyāsa al-Sharʿīyya*. Only few Hanbalis were appointed as judges.

was not rare to see doctrinal law books containing a chapter devoted to *adab al-qāḍī*, often preceded by chapters on adjudication, court procedure and witness testimony. To study the law thus also meant to study who adjudicates the law. Relevant sections can also be found in the literature of *ḥadīth* and in the genre of *ikhtilāf* (disagreements amongst jurists), where the emphasis is on the traditions on judges respectively on the differences between the various schools on matters of substantive and procedural law.[432]

Though basic principles were held in common, each law school developed its own principles of judicial reasoning, substantive legal doctrines, and guidelines for judges. *Adab al-qāḍī* works were thus heavily intertwined with the respective school doctrine, and the distinctiveness of the schools was also reflected in the normative stand on requesting and incorporating extrajudicial legal opinions.

The authors of *adab al-qāḍi* treatises were not only all scholars and teachers, many of them were also judges at one point in their lives. Thus, it can be solidly assumed that judicial practice, teaching and scholarly engagement with adjudication and its relation to extrajudicial authority informed their writings. These multiple perspectives have contributed to the richness and distinct value of this genre in the formative period of Islamic law, offering a corpus of legal theory together with minute details of court practice. Some of the existing *adab al-qāḍī* works have attained the format of manuals, revealing the originating contexts of discussions, and pedagogical questions and answers.[433] Their purpose was thus arguably to serve as teaching material[434] and to provide orientation for the profession of the judge. This can be particularly said for the Ḥanafī *adab al-qāḍī* literature, given the Ḥanafī dominance in the centre of the Abbasid Empire and the urge to keep recruiting for the judiciary from amongst them.[435]

The *adab al-qāḍī* material is primarily of normative value, and yet is informed by the realities of the judges. The nature of the material thus is ambiguous: The significance of

[432] On ḥadīth works that deal with adjudication see Abū Dāwūd, *Sunan*, II, p. 113ff; Bukhārī, *Saḥīḥ*, VIII, p. 104ff; Ibn Māja, *Sunan*, II, p. 774ff; Muslim, *Saḥīḥ*, V, p. 128ff; Tirmidhī, *Saḥīḥ*, I, p. 248ff; Mālik b. Anas , *Muwaṭṭa*, II, p. 719ff; Ibn Abī Shayba, *Kitāb al-Muṣannaf*, VII, p. 133-134, 239, 263, 280f; On *ikhtilāf* works see for instance Ibn Rushd, *Bidāya*, II, pp. 459. Schneider, *Das Bild des Richters* (1990), p. 148.
[433] Schneider, *Das Bild des Richters* (1990), p. 166; Masud/Peters/Powers, *Dispensing Justice* (2006), p. 16-17.
[434] Schneider, *Das Bild des Richters* (1990), p. 169-173.
[435] Tsafrir, *The History* (2004), p. 70-85.

the *adab al- qāḍī* literature lays less in being sources of information about actual court procedure.[436] Nor is their role limited to ideal codes of conduct for *qāḍīs*.[437] The *adab al-qādi* literature is more than a mere collection of job-specific instructions, it rather contains regulations of all aspects of the judiciary. Its recommendations have a normative character, not withholding that some have an idealtypical character. *Schneider* underlines the relation between *adab al-qāḍī* genre and judicial practice: The *adab al-qāḍī* literature represents reflected judicial reality[438] (and is thus a literature that is not unconnected to practice) while it also is an attempt to normatively shape the role of the judiciary. As Masud, Peters and Powers state, advising to use these sources with caution: "[A]lthough the *adab al-qāḍi* texts contain important information *about* court practice, they are not reports *of* court practice" [439] (italics in the original). For the purpose of this study, the value of the *adab al-qāḍī* works lays in the understanding of the Islamic judiciary of its time and school, and how its law-making authority is construed in light of concurring extrajudicial authority.

This source material is a choice necessitated by the earliest existant literature on judges that simultaneously contains information on their relation with jurisconsults. This also explains why this chapter, and largely the overall work, takes a judge-centered perspective on the question under study.

There are three points that I think are worth pointing out on overall significance of the *adab al-qāḍī* literature:

One, the very fact that the genre of *adab al-qāḍī per se* emerged deserves to be highlighted. There is no equivalent genre in the European legal tradition.[440] Among the early treatises on *adab al-qāḍī* mentioned above, contributions by three of the Sunni schools are evident, and the existence of a substantial number of books over the course of Islamic legal history on the theme of *adab al-qāḍī* indicates the importance attached to adjudication as an institution and its practice in the early Muslim society.[441]

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[436] Ziyada treats *adab* texts as a valuable source of information about actual court procedure, especially witness testimony and evidence, Ziyada, Khaṣṣāf, Introduction to *Adab al-qāḍī* (1978).
[437] Fyzee, "The Adab al-Qāḍī" (1964), p. 120 (with respect to the Ismaʿīlī Qāḍī Nuʿmān); Tyan, *Histoire de l'organisation judiciare* (1960), p. 9. Tyan considers the rules "laid down in these works have, to a great extent, only a theoretical character", p. 160.
[438] Schneider, *Das Bild des Richters* (1990), p. 252.
[439] Masud/ Peters/ Powers, *Dispensing Justice* (2006), p. 17.
[440] I owe this comparative information to Gerhard Dilcher, Professor emeritus of (European) Legal History, Frankfurt/Main.
[441] Surty, "The Ethical Code" (2003), p. 151.

Two, *adab al-qāḍī* manuals emerged without state involvement, despite the fact that the state created the framework for the administration of justice.[442] Possibly more important than the concrete norms for the correct behavior of the judge, I take it, is the fact that the genre as such signals that professional and ethical standards are tasks of the self-responsibility and self-control of the judiciary, and not the task of the state. [443] The creation of authority was left to the legal personae to sort out.

Three, the overall function of the *adab al-qāḍī* genre was possibly an acknowledgement that it was not sufficient for *qāḍīs* to be merely bound by the law (or, the authoritative texts of Qur'ān and Sunna). The *adab al-qāḍī* elaborations were meant to not overwhelm judges with cases of doubt in adjudication and to not merely refer them to their *forum internum*.[444] Much rather, the recommendations entailed were to assist judges with a manual that addresses the questions of adjudication under uncertainty. Moreover, given the plurality of adjudicative law, or the messy state of adjudicative law as caliphal secretary Ibn Muqāffa' would put it, the manuals offered a scholarly means to harmonize the law throughout the entire empire in the absence of a codified law.[445]
Significantly, there is a parallel literature on the Etiquette for the Jurisconsult (*adab al-muftī*) entailing guidelines for the jurisconsult as the interpretor of God's law. In this legal literature the *muftī* was advised to be aware of his responsibilities in issuing *fatwās*, towards the Muslim community, and before God. The *adab al-muftī* works outlined the qualifications for *iftā'* (*fatwā*-giving) and the rules and ethical norms governing its practice. They provided *muftīs* with precautionary measures to prevent abuse of *iftā'* by unqualified individuals and dishonest petitioners.

[442] On the judicial framework provided by the caliphate, see Chapter Four I.1.
[443] This was strikingly different, for example, in the Roman Empire where Emperor Hadrian decided to grant the advice of a jurisconsult to a judge the effect of a law, and was thus binding. In this case the political authority interfered to sort out questions of authority between judge and jurisconsult. See Kaser, *Das römische Privatrecht* (2008), p. 210; ibid, *Römische Rechtsgeschichte* (1978), p. 179; Sohm/Mitteis/Wenger, *Institutionen* (1949) p. 95; Wieacker, *Recht und Gesellschaft in der Spätantike* (1964), pp. 48-49; Wiacker, "Respondere ex auctoritate principis" (1985), pp. 71-94; Honoré,"The Severan Lawyers" (1962), pp. 228-229, 231; Fögen, *Römische Rechtsgeschichten* (2002), pp. 199-206; Tuori, "The ius respondendi and the Freedom of Roman Jurisprudence" (2004).
[444] Similarly Eckertz-Höfer, "Vom guten Richter" (2009), p. 739 arguing for the standardizing of professional ethical judiciary principles within the European Union.
[445] See Eckertz-Höfer, "Vom guten Richter" (2009), p. 739. See also Chapter Four, III. on Ibn Muqaffā''s evaluation of the adjudication of that time and his plea for codifying the law in the Abbasid Empire.

However, it was only as late at the 10th century, that *adab al-muftī* works emerged[446], and thus considerably later than the same genre for judges. Precisely because the majority of the *muftīs* acted in non-governmental capacity, many questions on the qualifications and practices of *muftīs* were systematically addressed and formalized considerably later than for the *qāḍī's.* Instead, the authority of the *muftī* was wholly a matter of scholarly reputation, his competence in legal theory. It was the knowledge acquired through the study and understanding of law that granted the jurists the privilege to issue legal opinions.[447] As the *adab al-muftī* emerged only after the period under study, this work necessitates a focus on the earlier emerging *adab al-qāḍī* which consequentially brings with it a judge-centred perspective on the entire approach of this work.

2. Main Works

The role of extrajudicial authority in adjudication, from the eighth to the tenth century, was mainly a debate between Ḥanafīs and the Shāfiʿīs. It is a debate between two schools of law of which one, the Ḥanafīs, during the eighth and ninth centuries, was closely linked to the Abbasid caliphate, controled the administration of justice and occupied the most important judgeships in the centre of the Empire, Iraq, the eastern provinces and was spreading its influence further westwards into Egypt. The Shāfiʿī school of law was barely represented in the judiciary in the Abbasid Empire during the ninth century.[448] The latecomers to the judiciary consequently were also latecomers in producing *adab al-qāḍī* works.Yet, through its school eponym Muḥammad Idrīs al-Shāfiʿī and his legacy, the Shāfiʿī school increasingly came to shape the legal theory of Islamic law (*uṣūl al-fiqh*), and through its increasing popularity amongst the scholars also reached the judiciary.

Ḥanafī and Shāfiʿī *adab al-qāḍī* works on the authority of judge and jurisconsult therefore are particularly instructive. The following two treatises belonging to the genre of *adab al-qāḍī* can be considered the main existant sources for the normativity of advice in the early period of Islamic law: Khaṣṣāf's (d. 261/874) *Adab al-qāḍī* (Etiquette of the Judge) for the Ḥanafī school of law and Shāfiʿī's (d. 204/820) *Kitāb al-umm* (translated as The Motherbook, or The Examplar) for the Shāfiʿī school.

[446] Masud, "Adab al-muftī", Encyclopedia of Islam (3).
[447] Motzki, "Religiöse Ratgebung" (1994), p. 13.
[448] It is the tenth century that sees the rise of the Shāfiʿī judges in Iraq, Egypt, Syria and Khurasān.

Khaṣṣāf, a 9th century jurist, represents the Ḥanafī school position on adjudication. Khaṣṣāf's greatest contribution to the theme of *adab al-qāḍī* is the detailed account he gives of the administration of justice in the early formative Islamic period, along with his legal analysis and decisions he provides for various legal cases related to, for example, oaths, witnesses, but also to substantial questions such as debts and wills, largely what we today call "private" law. In the first part of his work (sections 17-129), Khaṣṣāf elaborates on the theory of adjudication, the qualifications of the judge and the responsibility that comes with this position. It is in this first part that Khaṣṣāf discusses the relationship of the judge vis-à-vis the jurisconsult. While his treatise on the Etiquette of the Judge (*adab al-qāḍī*) addresses the norms of adjudication, it had no imperative character.[449] Rather, his manual was meant to serve as a guide to the judge in his everyday adjudication, and was also employed as teaching material for future judges. [450]

Over the centuries, Khaṣṣāf's *adab al-qāḍī* became one of the most commented upon and considered representative for Ḥanafi school positions on adjudication. The treatise of Khaṣṣāf has survived only as shortened and summarized pieces of information within larger works of commentary. The version used for this study is entailed in the earliest commentary by Jaṣṣāṣ (d. 370/981), a known Ḥanafī jurist and adherent of the "rationalist school" (*ahl al-ra'y*)[451], containing principally clarifications supporting Khaṣṣāf's positions, enriched with additional legal opinions from leading Ḥanafī scholars as well as references to Qur'ān and Sunna, rather than opposing material. This is also why it is not always feasible to discern where the original statement of Khaṣṣāf ends and the commentary of Jaṣṣāṣ starts. I will follow the editor *F. Ziadeh* in his attempt to distinguish between original text and commentary and slightly set apart Khāṣṣāf's statements from Jaṣṣāṣ comments. The commentary itself entails indications that it was based on teaching materials from the teaching circles it was used in. Elaborations of his earliest commentator Jaṣṣāṣ will therefore serve to clarify Khaṣṣāf's thoughts.

For the Shāfiʿī school of law, no one less than its eponym Muḥammad Ibn Idrīs al-Shafiʿī (150-204 /767-820), wrote the first treatise on *adab al-qāḍī* in a chapter on *adab al-qāḍī*

[449] Not all law or legal norms impose or proscribe specific behaviour or legally binding rights and obligations. Normativity must not be conflated with imperativity.
[450] On Khaṣṣāf's *adab al-qāḍī* as used for teaching purposes, Schneider, *Das Bild des Richters* (1990), p.170, Masud, "Adab al-Qāḍī", Encyclopedia of Islam (3).
[451] Spies, "Djaṣṣāṣ", Encyclopedia of Islam (2); Schacht, "aṣḥāb al-ra'y", Encyclopedia of Islam (2).

in his doctrinal law book, *Kitāb al-umm* (The Exemplar). While later Shāfiʿī jurists interpreted and expanded on Shāfiʿī's writing on the judge and consultation, they all referred to his foundational, though brief, section.[452]

Kitāb al-umm is a multivolume compilation of rules of mainly positive law (*furūʿ*).[453] The work follows the usual format for legal compendia of its time: It starts with matters of ritual, such as prayer and ritual purity, moving to transactional matters, such as divorce, contract, and land tenure. Shāfiʿī's explanations on adjudication and the judge's etiquette stood for a long time alone in his school as Shāfiʿī thought was not represented in the judiciary. Thus, when Shāfiʿī wrote his treatise he was possibly less affected by a close relation with judges but rather by his thoughts on legal theory that were to make him prominent.

Unlike Khaṣṣāf's work which deals in its entirety with recommendations for judges, Shāfiʿī's *The Etiquette for the Judge and what is Preferable for the Judge* (*Adab al-qāḍī wa mā yustaḥabbu lil qāḍī*) is a relatively short passage and comprises not more than seven concrete aspects[454]: 1. Adjudication at an accessible location, 2. no judicial secretary, 3. adjudication in the midst of the city, 4. no adjudication in the mosque but at a generally well accessible location, no enforcement of punishment in the mosque, 5. no adjudication while in the state of anger, 6. no business, 7. no disturbances of the litigation process, 8. participations at festive meals[455], 9. visits of the sick, memorial service of the dead, reception for the returning traveller[456], 10. [Judicial] Consultation.[457]

The respective texts are taken as exemplary of a dominant strand within Ḥanafī and Shāfiʿī legal thought, notwithstanding that school opinion showed a variety of intra-school diversity and disagreement. However, it is fair to say that few other jurists' works on adjudication have enjoyed as many commentaries as Khaṣṣāf's *adab al-qāḍī* for the Ḥanafī school or Shāfiʿī's *Kitāb al-umm* for the Shāfiʿī school.

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[452] See for instance prominent later Shāfiʿī scholar Māwardī (d. 1058), *Kitāb al-aḥkām al-sulṭānīyah*; Nawawi (d. 1277), *Ādāb al-fatwā wa-al-muftī wa-al-mustaftī.*

[453] *Kitāb al-umm* is conveyed through Rabīʿ b. Sulaymān al-Murādī (d. 270/ 884), one of Shāfiʿī's pupils during his time in Egypt. He is generally considered as the sole compiler and transmitter of *Kitāb al-umm*, see Halm, *Ausbreitung der shafiitischen Rechtsschule* (1974), p. 236; Schneider, *Bild des Richters* (1990), p. 11. Lowry, "Shāfiʿī" (2010), p. 236.

[454] Shafiʿī, *Kitāb al-umm*, VI, p. 214-220.

[455] Shāfiʿī, *Kitāb al-umm*, VI, p.220.

[456] Shāfiʿī, *Kitāb al-umm*, VI, p. 220.

[457] Shāfiʿī, *Kitāb al-umm*, VI, p. 219.

VI. Judge and Jurisconsult: Normative Positions in Adjudication

Adab al-qāḍī treatises also outline who the judge was to solicit, and, more importantly, when the judge was to consult an extrajudicial authority. The Qur'ānic verse 3: 159 where the Prophet himself is urged to "[c]onsult them in the matter; and when you have decided, place your trust in God", became a recurring reference to the fact that jurisconsults were seen as part and parcel of the Islamic judicial system. The scope of action of a jurisconsult was primarily linked to the jurisprudential role assigned to legal reasoning where authoritative texts remained ambiguous or even silent- a question that the schools of law diverged on substantially.

This Chapter Two discusses the normative aspects of both the judge's and jurisconsult's authority vis-à-vis each other, before then examining their empirical encounters in Chapter Three to complement the picture of authority.

One way to analyze the position of judge and jurisconsult in the legal and judicial system is via their qualifications and competences, both major elements of authority. This is even more important in the absence of specific Qur'ānic and *ḥadīth* references to the rank and competence of judge and jurisconsult.[458]

1. Whom the Judge is to Consult: A Question of Qualifications?

The question of eligibility (*shurūt*) of judge and jurisconsult is discussed with the aim to assess if different qualifications are expected of *qāḍī* and *muftī*, and if this might help to see how their authority vis-à-vis each other was debated, and consequently, created. What were the qualifications expected of a judge in the formative legal phase, what of a jurisconsult? What do differences, what do similarities in their qualifications allow us to conclude of their authority vis-à-vis each other?

The *adab al-qāḍī* writings of Khaṣṣāf and Shāfiʿī as the earliest normative and therefore main sources of this chapter offer valuable information on qualifications as part of authority building. The question of qualifications were discussed and laid down in juristic scholarship only, no normative state regulations existed. The question of qualification was laid in the hands of the jurists, underlining the largely self-regulatory structure of law and its staff.

[458] Rebstock, "A Qāḍī's Error" (1999), p. 2, with reference to the judge.

a. Eligibility of Judge

The task of a judge was first and foremost to adjudicate in order to terminate a litigational case between parties, and thereby to secure public order. Therefore the judge was appointed by the political authorities.[459] Literally the term *qāḍī* comes from the root q-ḍ-y, which means "to determine/ terminate" and "to decide" as as to "carry out one's duty".[460] The term also means "to look into authoritative references, cut off the controversy and bring it to an end ".[461] Also, it is defined as settling a contradictory case between two parties (*bayn al-khusūm*), i.e. litigation. [462] The importance to produce a final judgment is thereby underlined.

Though the word *qāḍī* itself is not mentioned in the Qur'ān, the verb *qāḍā* is mentioned frequently.[463]

Next to litigation, the judge also had non-litigious tasks to fulfil. They entailed e.g. the supervision of endowments, orphan's property, prisons, summed up as trusteeship (*amanāt*) where the judge took the position of a publically trusted official who protected the rights of the weak and the public.[464] For the fulfillment of the litigious and non-lititious tasks, Muslim legal scholarship gradually established criteria considered necessary that over time were increasingly systematized.

The Ḥanafī and Shāfiʿī eponyms of the law schools and early prominent jurists though still provided little or no information on the qualifications of the judges. [465] Neither in Shāfiʿīs *Risāla* nor in his voluminous *Kitāb al-umm*, which does contain a chapter on adjudication, do we find reflections on the qualifications of the judge.[466]

[459] On caliphal appointment of the Abbasid judge, see Chapter Four, I. 1.a. aa.
[460] Ibn Manẓūr, "qaḍā'", *Lisān al-ʿArab,* XV, p. 187.
[461] Ibn Manẓūr, "qaḍā'", *Lisān al-ʿArab*, XV, p. 187.
[462] Ibn Manẓūr, "qaḍā'", *Lisān al-Arab*, XV, p. 187-188, Al-Razi, *Al-zīnah fil kalimāt al-islamīyyah al-arabīyyah*, II, (1958), p. 138, al-Zaylʿī, *Sunan al-ḥaqā ʿiq sharḥ kanz al-daqā'iq*, IV, (1313 A.H.), p. 175.
[463] Next to the verb *qaḍa*, als *ḥakama* is frequently mentioned. Tentatively, *ḥakam* is used for the Prophet's activities in arbitration, while *qāḍā* occurs frequently in the sense of a sovereign ordinance of God or his Prophet or in connection with the Day of Judgment.Masud/Peters/Powers, *Dispensing Justice* (2006), p. 7.
[464] On the non-litigious tasks of the judge and how they were set apart from other legal actors within the judicial organizational order, see Chapter Four, I.2.a.aa. (2).
[465] See also Tillier, *Les Cadis* (2009), p. 213.
[466] See, *in contrario*, Shāfiʿī, *Kitāb al-Umm*, VI, p. 197-198.

Abū Yūsuf, Ḥanafī grand jurist and first Chief Justice (*qāḍī al-quḍāt*) in Islamic legal history mentions judges in his *Kitāb al-Kharāj* (Book of Taxes).[467] Instead of formulating criteria of qualifications for the judge, he recommends that the ruler as delegating judicial power makes inquiries about the morals and the conduct of those he wants to appoint for the judiciary. [468] Public standing of the judges thus seems to have played a significant role. Law and morality were intertwined for the question of suitability for the judiciary.

The Ḥanafī work of jurist Khaṣṣāf does not contain a section dedicated specifically to the qualifications for judges. Instead, some criteria appear in a chapter where the author examines cases where the judgment of a *qāḍī* is not valid:

If a *qāḍī* dispenses justice between the litigants during time, then when they learn that he is a slave, or non-Muslim (*dhimmi*), or that he committed the crime (*ḥadd)* of defamatory accusation of fornication (*qadhf*), or that he is impious (*fāsiq*), or blind, or that he allows himself to be corrupted in the exercise of his functions, and this since he was appointed, then his judgment is abrogated (*mardūd*) and does not need to be implemented (sec. 406).[469]

These negative criteria which make him lose all his competences and authority of office as *qāḍī* are complemented a little further by a positive definition of virtues which he must possess:

But if the *qāḍī* is appointed while he is honest (*'afīf*) and trustworthy (*ma'mūn*), and then when he passes his judgment or implements his sentence becomes impious, or goes blind, or gets in a state which does not allow him anymore to adjudicate, all [his

[467] This book was commissioned by the caliph, however without any known or explicitly assumed stipulations made by the caliph on commission. On scholar's writing on the request or rulers and how this affected their authority, see patronage in Chapter Four, III.1.d.
[468] Abū Yūsuf, *Kitāb al- Kharāj*, p. 107. Abū Yūsuf's further books *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā* and *Kitāb al-āthār* each include chapters on adjudication, however without mentioning criteria for establishing qualifications. Whether Shaybānī as the distinguished early Ḥanafī jurist has written down any clear guidelines for the qualification of the judge is not clear, his *Kitāb adab al-qāḍī* has not survived and is not included as part in his Kitāb al-aṣl. Abū l-Wafā' al-Afghānī, Introduction to al-Shaybānī, *Kitāb al-aṣl*, I, p. 7.
[469] Khaṣṣāf, *Adab al-qāḍī*, sec. 406, p. 354. Tillier, *Les Cadis* (2009), p. 214.

judgments issued] since he was in that state are abrogated (*mardūd*) and nul (*bātil*) (sec. 406).[470]

In section 13 of Khaṣṣāf's work on the *Etiquette of the Judge*, Khaṣṣāf directs the reader's attention to the legal-educational requirements of the judge: When judicial difficulties of inferring legal rules occur, especially in cases where there is no consensus among the Prophet's companions, it is necessary that the judge can exercise legal reasoning *de lege artis*. Both Khaṣṣāf and his commentator Jaṣṣāṣ recommend that the judge should belong to the people who can discern and infer rules (*ahl al-tamyīz wa al-naẓar*).[471]

These short indications on legal reasoning, confirm earlier and forthcoming elaborations in this study on the significance of legal reasoning for judges and evidence legal reflections on the conditions of eligibility for the judiciary. However, they still do not take the form of structured chapters and appear rather in passing in the course of a section dedicated to another subject. In fact, the requirement that the judge should belong to the people capable of discerning and inferring rules is contained in the chapter that deals with how to establish the law in cases ungoverned by authoritative texts, a question that will prove key for the rationale of judicial consultation.

The brief information provided by Abū Ḥanīfa and Khaṣṣāf can be summed up in what became increasingly discussed under the four categories for the eligibility of the judiciary: legal status, moral or religious characteristics, physical integrity and intellectual qualities.[472] Difference of opinion over the intellectual qualifications, and more precisely legal knowledge of judges, is discussed with particular attention. The criteria of eligibility mirror what was considered essential for the authority to gain access to the position or status of a judge. Competency and superiority as ascribed or claimed are based on personal-bound criteria which (today) include gender, race, religion, age, sexual orientation, ability, class as well as special knowledge or experience and are

[470] Khaṣṣāf, *Adab al-qāḍī*, sec. 406, p. 354. Tillier, *Les Cadis* (2009), p. 214.
[471] Khaṣṣāf, *Adab al-qāḍī*, sec. 13, p. 40-41.
[472] In fact, Tillier considers evidenced only the first three criteria, Tillier, *Les Cadis* (2009), p. 214- 216, while Schneider counts four conditions, adding educational qualification, Schneider, *Das Bild des Richters* (1990), p. 232-233.

constitutive for personal (or natural or primary) authority. [473] Complementary, authority as linked to a position, office or rank is highlighted further on in Chapter Four.

The first criterion established by Muslim legal scholarship concerns the legal conditions regarding the personal status of the judicial candidate. The *qāḍī* can neither be slave, nor a non-Muslim (*dhimmī*). It is therefore, *a contrario*, that he needs to be free and of Muslim belief, and by extension, of legal capacity, of age and male gender. The judicial office holder must be of full age and free because otherwise the *qāḍī* will not be legally responsible for his actions. [474] Moreover, he must be a Muslim, since a non-believer cannot be placed in authority over Muslim believers. However, Abu Ḥanīfa holds that a non-Muslim may act as a judge in his own community.

Some criteria were not explicitly mentioned or elaborated in Khaṣṣāf but shaped the legal debates elsewhere. There was a debate, for instance, on the condition that the holder of the *qāḍī's* office must be male, since women were considered incapable of carrying out the duties of a public position. The position that only men can serve as judges was held by Shāfiʿīs and Ḥanbalīs.[475] *Fadel* argues that these debates were in fact debates about acts of power, as Muslim jurists were unanimous in allowing women to interpret the law and issue legal opinions.[476] School eponym Abū Ḥanīfa is quoted by jurist Māwardī as being of the opinion that women may lawfully act as judges in matters where their evidence is valid.[477] Similarly, Khaṣṣāf's commentator Jaṣṣāṣ (d. 980) put forth that who is not admitted as a witness may not become a judge (sec. 406).[478] Thus, Hanafīs generally held that women's adjudication was permissible.[479] However, they excluded adjudication over crimes possibly resulting in *ḥadd* punishments (Qur'ānically prescribed, largely corporal punishments). The Ḥanafī distinguished jurist Ṭabarī (d. 923

[473] In contrast to personal authority, when authority is linked to a position (such as office or rank), institution or organization, authority is qualified as positional, or abstract, formal or secondary authority, Gukenbiel, "Autorität", p. 29. This type of authority (*Amtsautorität*) will be discussed in Chapter Four, I.4.On personal authority, Gukenbiehl, "Autorität" (2001), p. 29, here with added criteria.
[474] Levy, *The Social Structure of Islam* (1957), p. 339.
[475] Al-Māwardī, *al-Aḥkām al-sulṭāniyya, p.* 107-8; id., *Adab al-qāḍī*, I, p. 625-8; Ibn Qudāma, *al-Mughnī*, XIV, p. 12-13; Tillier, "Women before the Qāḍī" (2009), p. 287.
[476] Fadel, "Two Women, one Man", (1997), p. 196.
[477] Al-Māwardī, *al-Aḥkām al-sulṭāniyya, p.* 107-8; idem., *Adab al-qāḍī*, I, p. 625-8.
[478] Jaṣṣāṣ, in Khaṣṣāf, *Adab al-qāḍī*, sec. 406, p. 354.
[479] The Ḥanafī understanding of equating women judges with women witnesses was that both were similar in that both exercise power over litigants. Because a woman when testifying against a litigant excercises power over that litigant, there is no reason to believe she cannot exercise power over that same litigant in the capacity of a judge, Fadel „Two Women, one Man" (1997), p. 2003, note 37, Tyan, *Histoire de l'organisation* (1960), p. 162.

C.E.), however, held, that women can adjudicate disputes in all areas of the law.[480] He argues that if women were allowed to issue tolegal opinions in all areas of the law, then a fortiori their rulings of law must be valid too.

Second come moral and religious criteria of suitability. They are expressed by Khaṣṣāf in the requirements of the judicial candidate being honest and reliable, qualities that stand in opposition to corruption (*rashwa*) and defamatory accusation of fornication (*qadhf*).[481] Piety and integrity are considered very important moral and religious criteria, as well as fear of God, virtue, patience and sense of responsibility. The close link between the function a person fulfils and the virtues he must possess is a recurring theme, and known also in the Western history of philosophy and jurisprudence.[482] For instance, philosopher *Alasdair Macintyre* prominently argues in favour of virtue ethics. According to *Macintyre*, and similar to Khaṣṣāf and Shāfiʿī, a good judgment emanates from a good character that builds on habits and knowledge.[483] For Muslim jurists, piety became the hallmark of the learned religious elite in general and of the jurists (*fuqahā'*). *Hallaq* states that the importance of piety in Muslim (legal) culture cannot be overemphasized, either at this early time or in the centuries to follow, calling for justice and equality before God.[484]

.Thus, a *qāḍī* cannot be an impious person (*fāsiq*), defined as "the one who moves away from a right behaviour" (*istiqāma*), "who leaves the order of God and moves away from the right way" (*ṭarīq al-ḥaqq*), involving a multitude of what was considered improper behaviour.[485]

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[480] Mawārdi, *Al-Ḥāwī al-kabīr*, vol. XVI, p. 156. Despite the theoretical recognition of women serving as judges in Ḥanafī law, Tyan found only one female judge in Islamic pre-modern history: Thaml/Thumal (mother of caliph al-Muqtadir) was appointed at the *maẓālim* court in 306/918-19, under caliph al-Muqtadir, Tyan, *Histoire de l'organisation judiciaire*, (1960) p. 162; see also Ibn al-Jawzī, *al-Muntaẓam* VIII, p.12; El-Cheikh, "The Qahramāna in the Abbasid Court" (2003), p. 52-53; Tillier, "Women before the Qāḍī" (2009), p. 287.

[481] Tillier, Les *Cadis* (2009), p. 214.

[482] See MacIntyre, *After Virtue* (1984), particularly, pp. 181-182, on Aristotle's description of exercise of virtue leading to the achievement of the human *telos*. On the relationship of virtue and justice, see Resnik/Curtis, *Representing Justice* (2011), pp. 8-12. Regarding the importance of virtues for authority in Islamic (legal) history, and with explicit reference to MacIntyre, see Asad, "The Idea of an Anthropology of Islam" (1984), p. 14-15; Ziadeh, "Integrity" (1990), p. 92; Zaman, *Ulama in Contemporary Islam* (2002), p. 195.

[483] MacIntyre, *After Virtue* (1984), particularly, pp. 181.

[484] Hallaq, *Origins* (2005), p. 180.

[485] Ibn Manẓūr, *Lisān al-ʿArab*, V, p. 129 ; Tillier, *Les Cadi* (2009), p. 215. In his comment of the work of Khaṣṣāf, the jurist al-Jaṣṣāṣ (d.370/980-81) maintains that it is possible to qualify in concrete terms "fāsiq" as a members of a faction (*asḥāb al-ʿaṣabiyya*), the brigands (*quṭṭāʿ al-ṭuruq*), the thieves, the fornicators

A criterion that seems indispensable is that the *qāḍī* should be of honourable character.[486] Integrity (*ʾadāla*) is emphasized as a necessary characteristic for a person to assume public office, and it applies to the caliph, as well as to the judge and to the court witness.[487] This might find its echo in the idea that there is a tendency among Muslims to locate authority in righteous individuals as opposed to self-evidently true texts.[488]
Possibly, the focus on moral and religious integrity was given so much weight with the debate on the burden of adjudication in mind. After all, the cautions of the judge mark the first lines of every treatise on adjudication. The demand for integrity is likely to reflect the fear and threat to not be able to do justice to the responsibilities of adjudication. It is a reminder that such a task risks the dangers of all sorts of corruption (moral and financial), bribery and fraud. Explicitly, the fate in the Hereafter of a judge misspeaking justice and being lured and attracked by the ills of corruption were themes brought in by the (theological) opponents of the learned to the career of judge.
The call for integrity as an ethical standard is surely also an appeal for professionalism, a way to assure a correct functioning of and within the judicial system, and a precondition for the suitability of judicial candidates regarding the responsibilities of the judicial office.[489]

The third criterion is that of physical integrity: The *qāḍī* must be a person of sound eyesight and hearing, a precondition for good understanding and perception in adjudication. Khaṣṣāf mentions this in the negative, by considering void the judgment of a blind judge.[490] Succeeding jurists affirmed physical health regarding vision (*baṣar*),

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(*aṣḥāb al-fujūr bi al-nisāʾ*), but Khaṣṣāf seems to equally include in this category homosexuals (*qawm Lūṭ*), the singers, the pigeon lovers, the players of chess, those who drink wine or are surrounded by wine (*nabīdh*), and those who you would refuse their testimony. Tyan, *Histoire, de l'organisation judiciaire*, (1960),p. 166; Khadduri, *The Islamic Conception of Justice* (1984), p. 149 sees in *fisq* the contrary to "justice". See also Schneider, *Das Bild des Richters* (1990), p. 232. Tillier, *Les Cadis* (2009), p. 215. Ziadeh, "Integrity" (1990), p. 75.

[486] Levy, *The Social Structure of Islam* (1957), p. 339.

[487] Ziadeh, "Integrity" (1990), p. 75.

[488] Graham, "Traditionalism in Islam" (1993), p. 495-522; Jackson, *Islamic Law and the State* (1996), p. xxxi-xxii.

[489] Integrity is mentioned as part of ethical professional standards of the judiciary as laid down, for example, in the UN Bangalore Principles of Judicial Conduct, issued 2002. On ethical professional standards in the international, European and German context, Eckertz-Höfer, "Vom guten Richter" (2009), p. 739-740.

[490] With this argumentation caliph al-Rashīd removed from office judge Wakīʿ b. al- Jarrāḥ, Wakīʿ, Akhbār al- Quḍāt, III, p. 184.

hearing (*sam'*) and speech (*nutq*) as condition for being able to assess the evidence being brought to the judge.[491]

The fourth qualification, and by far the most discussed in today's literature, is that of legal knowledge. The fact that it is not explicitly as one of the required qualifications (*shurūṭ*) and yet is mentioned in different variants in the texts on adjudication, make it a controversial point. Arguably, knowledge is amongst the most significant criteria for the establishment of authority, as it can establish superiority towards the non-knowledgeable. *M. Tillier* states that moral and intellectual qualifications were mentioned, but that legal knowledge was not constitutive for the office of *qāḍī*. [492] He refers to the elaborations of jurist and judge al-ʿAnbarī on the sources of law for adjudication: First of all comes the Qur'ān; then it is the Sunna of the Prophet, consensus of the leading jurists (*fuqahā'*), and finally *ijtihād* in consultation with the leading scholars (*ahl al-'ilm*).[493] Al-ʿAnbarī then goes on to clarify that because judicial decisions of his time are less based on Qur'ān and Sunna, and much rather on independent legal reasoning (*ijtihād*), it is important that the *qāḍī* be a pious man, smart and of knowledge (*'ilm*) – in this order of importance.[494] *I. Bligh-Abramski* refers to this same passage of al-ʿAnbarī but argues that when al-ʿAnbarī wrote to caliph al-Manṣūr that *ijtihād* was the basis of many judicial decisions, he by implication excluded anyone who is not a scholar (*'ālim*).[495] Legal reasoning (*ijtihād*) could not be exercised without legal knowledge.[496] Legal knowledge, accordingly, was definitely required for the position of the judiciary.

For *M. Tillier*, however, the scholarly knowlege of Qur' ān and Sunna, eventually does not form part of the necessary and fundamental qualities. Instead, he says, al-ʿAnbarī stresses the consultation of other scholars. For *Tillier*, "religious knowledge" is thus considered important, however not raised to the supreme rank of qualities of the *qāḍī*, since it is first of all his moral virtues – especially its strength of character – and his understanding of social manners and of human behaviours which allows the judge to speak justice.[497]

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[491] See for instance Māwardī, *Adab al-qāḍī*, pp. 107-109; Rebstock, "A Qāḍī's Error" (1999), p. 8.
[492] Tillier, *Les Cadis* (2009), p. 191.
[493] Wakīʿ, *Akhbār al-quḍāt*, II, p. 101. On al-ʿAnbarī's treatise, see this Chapter Two, II.3.
[494] Wakīʿ, *Akhbār al-quḍāt*, II, p. 101. Bligh-Abramski, "The Judiciary as a Government Tool" (1992), p. 205-206.
[495] Bligh-Abramski, "The Judiciary as a Government Tool" (1992), p. 209.
[496] On the legal qualifications needed for legal reasoning (*ijtihād*), see this Chapter Two, V.1.b.
[497] Tillier, *Les Cadis* (2009), p. 191.

M. Tillier concedes that since al-ʿAnbarī was an emminent legal scholar and *qāḍī* himself, one cannot assume that he underestimated and undervalued the importance of legal knowledge as such. But much rather that knowledge is something that can always be brought in by seeking consultation.[498]
The reference to al-ʿAnbarī indeed stresses the necessity of advice of scholars for good adjudication. The stipulation to consult, coming out of the mouth of a legal scholar and a judge, shows that both for scholarly and adjudicative, professional reasons, judicial consultation is strengthened by al-ʿAnbarī. But does it also mean that consultation is required because judges lack legal knowledge as a qualification?

Even though legal knowledge remains barely explicitly mentioned and rather seems to come after moral criteria, an overall look at the *adab al-qāḍī* literature might illucidate the rank of knowledge for the position of the judiciary.
Typically, *adab al-qāḍī* treatises start with the the foundations of the law, legal theory (*uṣūl al-fiqh*). The authors agree that knowledge is a prerequisite for taking up the office of the judge because the knowledge of the theory of law is the basis for adjudication.[499]
In Khaṣṣāf's introduction to the foundations of justice and the methodes of legal hermeneutic at the beginning of his *adab al-qāḍī* work he clearly points out that the *qāḍī* needs to be a scholar (*wa yanbaghyi lī l-qāḍī an yakūna ʿaliman,* sec. 10). [500] With requiring the judge to be a scholar-judge, Khaṣṣāf hopes to guarantee that the judge is sufficiently knowledgeable, qualified and competent for adjudication. As we have seen in Khaṣṣāf and Jaṣṣāṣ (sec. 13), they require the judge to belong to the people who can discern and infer legal rules (*ahl al-tamyīz wa-al-naẓar*).[501] Moreover, in section 24 Khaṣṣāf includes the narration of caliph ʿUmar who wrote to Muʿādh ibn Jabal, his appointed judge in Yemen and to Abū ʿUbayda (commander over Syria), saying: „Seek out the men of knowledge, those who are pious amongst you, and use them in the service of the judiciary, showing them generosity in respect of payments." [502] According to this report, the first criterion for selecting the judiciary was knowledge, followed by the second, piety.

[498] Ibid.
[499] Khaṣṣāf, *Adab al-qāḍī*, pp. 1; Schneider, *Das Bild des Richters* (1990), p. 166.
[500] Khaṣṣāf, *Adab al-qāḍī*, sec. 10, p. 37.
[501] Khaṣṣāf, *Adab al-qāḍī*, sec. 13, p. 41.
[502] Khaṣṣāf, *Adab al-qāḍī*, sec. 111, p. 110.

The definition of knowledge (*ʿilm*), and whether specifically legal knowledge is meant, emerges as crucial for adjudication as an activity. *ʿIlm* is not only a generic term for knowledge. For Shāfiʿī, so *N. Calder*, "*ʿilm* is defined as relating only to knowledge of the law."[503] Specifically, it is knowledge of the law acquired primarily from revealed texts. Knowledge might also arise secondarily from sources that, while not strictly with the bounds of revelation, are nonetheless necessary for understanding revelation for purposes of deriving the law, such as consensus (*ijmāʿ*), Arabic lexicography, and sacred history. Thus, the knowledge refered to here and the people who own this knowledge master revelation, legal rules derived from revelation, supplementary information, and interpretative techniques.[504] Similary, *W. Hallaq* considers *ʿilm* "the genuine understanding of the quality of textual evidence and the lines of legal reasoning through which legal norms are derived".[505]

The term scholar (*ʿalim*) as a derivative of knowledge (*ʿilm*), thus also refers to someone who masters the art of legal scholarship. So Khaṣṣāf's mentioning that the judge should be a scholar and that the choice of judges should be made according to knowledge (and piety), makes clear that he considers legal knowledge as fundamental for adjudication.

Similarly, Muzāni (d. 264/ 878) in his commented version of Shāfiʿī's *Kitāb al-umm* explictly mentions the ability to draw analogies as a requisite for judges.[506] The drawing of analogies as a main source and methodology includes legal interpretative knowledge based on the authoritative texts containing the original case from which to draw analogy, and thus clearly necessitates knowledge of the core themes of law and legal theory.

M.Tillier concedes that possibly the jurists did not feel the need to define the educational qualifications in a structured and systematic way, as they might have felt that they were appropriately and sufficiently considered and applied and did not deserve a separate or explicit treatment.[507]

W. Hallaq picks up on the discourse of positive legal works with regard to the *qāḍī's* professional credentials, particularly those pertaining to competence in *ijtihād* – and highlights that the legal credentials are omitted.[508] But with reference to the time of

[503] Calder, "Ikhtilāf and Ijmāʿ" (1983), p. 70; Lowry, *Early Islamic Legal Theory* (2007), pp. 277-278.
[504] With reference to Shāfiʿī's seminal work *Risāla* ("Epistle"), Lowry, *Early Islamic Legal Theory* (2007), pp. 277-278.
[505] Hallaq, *Authority* (2001), p. 4.
[506] Muzānī, *Mukhtaṣar*, VIII, p. 407.
[507] Tillier, *Les Cadis* (2009), p. 216.
[508] Hallaq, *Authority* (2001), p. 76.

Shāfiʿī he concedes that "in a period in which *ijtihād* was a lively activity (i.e. not controlled by the hermeneutical imperatives of the school)[509] there certainly were many *qāḍīs* who were competent as *mujtahids* [those qualified to exercise *ijtihād*, legal reasoning], a fact abundantly attested by biographical and theoretical works."[510] He concedes that Khaṣṣāf (d. 261/874) and Jaṣṣāṣ (d. 370/981) argue that the *qāḍī* should be knowledgeable in legal interpretation so as to be able to derive rulings from the revealed texts. This appears as the first order of preference.[511] He concedes though that the *qāḍī qua qāḍī* is not excluded from the position when he does not master the legal sciences.

I. Schneider, however, focuses on the absence of detailed information on the educational qualifications and assesses that though the judge's capability to exercise *ijtihād* is given great importance, this skill is not considered an unconditional qualification according to Khaṣṣāf. [512] *I. Schneider* rather argues that the requirement for judges being scholars and knowing the methods of legal reasoning might in fact be a requirements referring to the reverse reality of lay-judges in adjudication[513], inserted to minimise their existence. If *I. Schneider's* assumption is correct, it would signify that jurists took consideration of non-jurist judges in the judicial system, yet attempted to to reduce their existence to the furthest extent possible, without making unlawful the ruler's appointment of the non-jurist judiciary. Perhaps the Ḥanafīs had to have a more pragmatic approach to adjudication since they provided the majority of judges to the early Abbasid system[514] and perhaps were more willing to lower their qualificational standards to guarantee that as many of their school followers take office as judiciary. The issue of legal knowledge was thus possibly treated as a reflection of the empirical situation of the judiciary.[515] However, though there is documentation of lay-judges in the Abbasid judicial system

[509] Hallaq, *Authority* (2001), p. 77.
[510] Hallaq, *Authority* (2001), p. 77.
[511] Hallaq, *Authority* (2001), p. 77.
[512] Schneider, *Das Bild des Richters* (1990), p. 232.
[513] Schneider, *Das Bild des Richters* (1990), p. 168 on the question of lay judges in the adjudication system, and on the level of legal knowledge of the studied jurist-judges.
[514] On the (disputed) preference of the Abbasids for Ḥanafī scholars, see Chapter Four I.1.b (preference through chief justice) and Chapter Four III 1.e (preference through scholars).
[515] Empirically, the level of educational knowledge and its effect on judicial consultation will be discussed in Chapter Three, addressing the willingness and contexts of judges to seek consultation and Chapter Four, discussing the educational background of judges in the course of professionalization. In both parts, it will be seen that knowledge was expected, sought after, examined and exceptions made, and that judicial consultation took place regardless of the level of legal knowledge of the judge.

and the Ḥanafīs permitted a judge who does not know the rules of *ijtihād* to adjudicate, by far most judges under the early Abbasids were studied jurists. [516]

The fact that the normative requirements of the legal credentials of judges were mentioned outside the section on judges but disseminated throughouth the entire treatise seems to lead to two possible conclusions: legal knowledge (and the ability to exercise interpretive legal reasoning, *ijtihād*) is important but not constitutive, or legal knowledge (and *ijtihād*) is implicit and nonetheless constitutive. For the question under study, this raises the following question: was judicial consultation stipulated to make up for the (lack of) legal knowledge of judges or, independent of the level of legal knowledge, and out of consciousness of the law's indeterminacy.

It became established in all legal schools to impose as a condition for the judiciary not only legal knowledge but the capacity of *ijtihād*. [517] *Ijtihād* (legal reasoning) cannot be exercised without the knowledge of legal theory (*uṣūl*) and substantial law (*furū')* and was considered crucial for adjudication. Yet, we also need to take note of the paradox that Ḥanafīs later explictly allowed for a layman (*'āmmi*) to become judge, and that this non-jurist-judge can draw his knowledge through consulting others. [518] The Ḥanafī exception to allow for a non-jurist, or a jurist not skilled to exercise interpretive legal reasoning (*ijtihād*) to adjudicate does still not easily allow the conclusion that the Ḥanafīs suggested judicial consultation to make up for non-existent legal skills. This can be witnessed by, for example, the *adab al-qāḍī* work of Ibn al-Qāṣṣ (d. 335/ 946) appearing roughly one hundred years after Khaṣṣāf's. Ibn al-Qāṣṣ was a Shāfiʿī legal scholar who, by his own explanation, synthesized Ḥanafī and Shāfiʿī legal thoughts.[519] His work is an example of how elements and branches of legal knowledge required for *qāḍī* position become more and more systematized and elaborated. Significantly, Ibn al-Qāṣṣ, despite an increase of required knowledge, also demands that the judge seeks consultation.[520] A raised bar of demanded legal knowledge did not exclude the seeking of

[516] See, for instance, Tillier, *Les Cadis* (2009), p. 191; Masud/ Peters/Powers, *Dispensing Justice* (2006), p. 10 stating that there was no lack of qualified judges.
[517] See also Vogel, *Islamic Law and Legal System* (2000), p.144-145, with the Ḥanafīs regarding *ijtihād* more of a recommendation than a condition. At a time when the Ḥanafīs were eager to dominate the judiciary, this leniency possibly allowed them to present more judicial candidates.
[518] Schneider, *Das Bild des Richters* (1990), p. 212, refering to the explorations of Ḥanafī scholar Simnāī.
[519] Ibn al-Qāṣṣ, *Adab al-qāḍī*, I, pp. 23- 25, p. 68; See Tillier, *Les Cadis* (2009), p. 216-217; Hallaq, *Authority* (2001), p. 66.
[520] Ibn al-Qāṣṣ, *Adab al-qāḍī*, p. 24.

legal counsel. Put differently, the previously formulated demand for a judge to seek consultation cannot (only) be explained with a possibly lower level of Islamic legal education or the fact that some judges did not have a background in law. The jurists anticipated and welcomed the necessity that qualified authorities meet in situation of consultation, i.e. the qualified jurist-judge and the jurisconsult(s).
Judicial consultation had its established position within the normativity of the Islamic legal system, and seems to have been stipulated independently from the legal qualifications of the judges.

b. Eligibility of Jurisconsult

Jurisconsults (*muftīs*) are first and foremost jurists. [521] These experts of law, when they wrote about law, were called *faqīh (jurist)*; when they opined about a particular case and performed the function of issuing a legal opinion, they were called *muftī (jurisconsult)*.[522]

No formalized rules were laid down to fulfil the requirements as *muftī*. As the *adab al-muftī* genre (Etiquette for the Jurisconsult) came up only as late as in the 10th century, it means that during the period under study (8-9th century), no attempt was made at formally standardizing the qualifications and procedures for jurisconsults was made.[523] Instead, some information on the qualifications on the *fatwā*-giving personae are available in the early legal compendia of the school eponyms.

The Mālikī school eponym Mālik ibn Anas reportedly set up the following qualifications for *muftīs*:

This affair, that is *ḥadīth* and the giving of *fatwas*, requires men characterized by the fear of God (*taqī*), piety (*wara'*), cautiousness (*siyanah*), perfectionism (*'itqān*), knowledge (*'ilm*), and understanding (*fahm*), in order that they perceive what is coming out of their

[521] Masud/Messick/ Powers, *Muftis, Fatwas and Islamic Legal Interpretation* (1996), p. 15.
[522] The jurisconsult (*muftī*) and author-jurist (*muṣannif*) usually are one and the same person and were key in legitimazing and formalizing changes in law. Hallaq, *Authority* (2001), p. xii; Masud/Messick/ Powers, *Muftis, Fatwas and Islamic Legal Interpretation* (1996), p. 15.
[523] Reasons for why the *adab al-muftī* genre came about so late are discussed in Chapter Four III.2.e., when the professional development of jurisconsults as legal scholars will be discussed regarding their little confined, largely independent organizational authority.

heads and what the results of it will be tomorrow. But as for those who lack this perfectionism (*'itqān*) and awareness (*ma'rifa*), no benefit can be derived from them. They are not authoritative sources of knowledge (*hujjah*), and one should not take knowledge from them.[524]

In enumerating the qualifications of a *muftī*, Mālik ibn Anas starts with the moral and religious characteristics like fear of God and piety. He goes on to stress a professional meticoulousness in issuing legal opinions that requires cautiousness and perfectionism. Then come knowledge and understanding, so that *muftīs* can assess the ruling they will issue and, furthermore, assess the consequences of their legal opinion. Mālik requests a consciousness for giving *fatwās*, for, as he says, without perfectionism and awareness of the rules of giving *fatwās* there can neither be benefit from the *muftīs* nor can one consider them an authoritative source of knowledge. In this case, they can not be considered an authority of knowledge. In return, however, this means that with moral-religious attributes, with a professional consciousness for the *lege artis* and necessary knowledge, *muftīs* are by definition an authority of knowledge. Their approach and access to knowledge is what explicitly characterizes the role of the *muftī* in the Islamic order of legal personae, on par with the collectors and narrators of *ḥadīth*. Mālik emphasizes the special care for the law that is built on their knowledge. Parallel to the qualifications for judges, Mālik first lists moral and religious criteria before knowledge, and thus considers criteria that form part of the very character of the *muftī* crucial for the trustworthiness and reliability of the resulting law.

Mālik ibn Anas is also reported for having said that he did not give legal opinions (*fatwās*) until "seventy [jurists] testified that [he] was qualified to do so."[525] Thus, by the first century of Islam there was a system for evaluating and determining, next to a person's moral suitability, a person's educational qualifications of the law, as a prerequsite for issuing *fatwās*.[526]

Aḥmad ibn Ḥanbal, eponym of the Ḥanbalī school of law was asked:

[524] Abd-Allah, *Malik's Concept of 'Amal* (1978), p. 75.
[525] Cited in al-Nawawi, *Adab al Fatwa* wa *al-Mufti wa al-mustafti*, p. 18; Masud/Messick/Peters, *Islamic Legal Interpretation: Muftis and Their Fatwas* (1996), p. 20.
[526] Tomeh, "Persuasion and Authority" (2010), p. 149.

"How many hadith reports will suffice a man to give juridical opinions? Will 100,000 suffice?" He said: "No." He was asked, "200.000?" He said, "No." He was asked "300.000?" He said, "No." He was asked, "400.000?" He said, "No". He was asked, "500.000?" He said, "I hope so".[527]

Whether meant literally or rather symbolically, the high number of *ḥadīth* is indicative for mastering the law and mastering the art of giving legal opinions as a requirement of giving fatwas – at least for the traditionalists who found their understanding of law on *ḥadīth* reports.

As Ḥanafī scholars, Khaṣṣaf and Jaṣṣāṣ refer to the eponym Abū Ḥanīfa for the qualifications of the jurisconsult[528] and list the qualifications of trustworthiness, piety, reliability, understanding (*fahm*), and knowledge (*ʾilm*). The jurisconsult is referred to as jurist (*faqīh*), belonging to the people of knowledge (*ahl al-ʾilm*). [529]

Shāfiʿī himself has set up qualifications specifically for the one the judge shall consult. In the section on "judicial consultation" (*mushāwara*), he makes it clear that the consultant needs to possess thorough knowledge of authoritative texts and exhibit piety, in this order:

"I recommend the judge to consult with someone who is knowledgeable in Qur'ān, Sunna and the customary traditions (*āthār*) as well as the jurists' doctrines, someone who knows [the rules] of analogy and someone who does not violate the wording and meaning [of Qur' ān and Sunna]. These criteria will only be found with someone who masters the Arabic language. Even when he combines all these criteria, he should consult with him only if he is evidently pious and [only if] he seeks the truth only."[530]

According to Shāfiʿī, the extrajudicial advisor has to have a thorough education, possess knowledge of the Qurʿān and Sunna, and the Arabic language, be familiar with long-established traditions and must be familiar with the local population and their customs.

[527] Ibn Abī Yaʿlā, *Ṭabaqāt*, I, p. 131; Melchert, *The Formation* (1997), p. 25.
[528] Khaṣṣāf, *Adab al-qāḍī*, sec. 105, p. 104.
[529] Khaṣṣāf, *Adab al-qāḍī*, sec.108, p. 106 (*ahl al-ʾilm*); sec. 20, p. 43 (faqīh). See also Badry, *Die zeitgenössiche Diskussion um den Beratungsgedanken* (1998), p. 144.
[530] Shāfiʿī, *Kitāb al-umm*, VI, p. 219.

He needs to remain true to the wording of the authoritative texts, and is seen to assure this when exhibiting piety as a commonly understood characteristic of integrity.[531] Knowledge and piety thus were considered central features for the extrajudicial advisor, in this order of appearance.

A separate section of the *adab al-muftī* treatises sets forth the formal "conditions" (*shurūt*) required of candidates for the position. The specifics of these conditions highlight an initial set of differences between a *muftī* and a *qāḍī*. In one such text of the 13th century, famous Shāfiʿī scholar Nawawī summarized the conditions: The candidate is to "be an adult, Muslim, trusted, reliable, free of the causes of sin and defects of character, a jurist in identity, sound of mind, firm in thought, correct in behavior and derivation, (and) alert."[532] The passage continues: "Equally (suitable) are a free man, a slave, a woman, a blind man, and a mute- if he can write or if his gestures are understood." Beyond the generally more stringent moral requirements and higher intellectual standards of position, the mufti was distinguished from the judge in that the incumbent could be, in theory, a woman or a slave.[533]

The question arises whether *muftīs* and the extrajudicial authority which judges were to consult were one and the same, or two different categories of legal personae. The second question is why, if they are the same, the technical term *muftī*, is not used.

The Shāfiʿī jurist Māwardī, around hundred years after Shāfiʿī, gives a straightforward formula: "[Judicial] Consultation is allowed with everyone whose legal opinons are legally valid."[534] Thus the jurisconsult solicited by a judge needs to fulfill the qualifications of a *muftī*, not those, as also would be thinkable, of a judge. The formula translates into the following criteria: Being a committed Muslim of age, legally trained to exercise interpretive legal reasoning (*ijtihād*) and conscientious in dealing with the authoritative texts, are the core criteria put forth by doctrine on who can become a *muftī*. Questions of gender, the status of free or enslaved, or physical impairment (especially

[531] Ziadeh, "Integrity" (1990), p. 73.
[532] Al-Nawawi, *Adab al-Fatwā*, p.19.
[533] Masud/Messick/Powers, *Islamic Legal Interpretation: Muftis and Their Fatwas* (1996), p. 18.
[534] Māwardī, *Adab al-qāḍī*, I, pp. 264-265, sec. 421-424; See also, Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 145.

sight), are, unlike with *qaḍīs*, not set up in any normative works.[535] This means that in principle women, slaves, and blind can theoretically be sufficiently qualifiable to be solicited on legal questions.[536]

These concessions, as compared to the criteria for judges, can be explained with the opinion-giving side not being in public adjudicative office: Neither do they need to be fully legally capable to enforce their opinion, nor do they need to establish any facts.[537] Also, the fact that consultation is not bound to a public office seems to reduce the warnings about the dangers of corruptions.

Further valuable information is made available in the sections on judicial consultation (*mushāwara*) in the *adab al-qāḍī* treatises on the question on who were the extrajudicial authorities that were meant to be consulted by judges. In fact, and perhaps reflecting the pre-*adab al-muftī*-standardized terminology, extrajudicial authority came by many names: Shāfiʿī speaks only of "the consultant" (*al-mushīr*)[538], reflecting consultation (*mushāwara*) as activity under question. Khaṣṣāf employs several notions when referring to the jurisconsult, like belonging to the "people of knowledge" (*ahl al-ʿilm)*[539] or "people of jurisprudence" (*ahl al-fiqh).*[540] Mostly however he refers to jurists (*fuqahāʾ*)[541], or in the singular jurist (*faqīh*)[542] or a singular juristic man (*rajulan fiqhīyan waḥidan*)[543] and in one case to "those who sit with me [the judge]" (*julasāʾī)*[544]. Except for the latter, all names used by Khaṣṣāf refer to knowledge and specifically to juristic knowledge.

While jurists, in the singular and plural, are the most referred group of jurisconsults, extrajudicial authority also comes under the name of "the people of knowledge" (*ahl al-ʿilm*). As discussed before, *ʿilm* was defined by Khaṣṣāf's contemporary Shāfiʿī as knowledge relating to law, acquired primarily but not exclusively from revealed texts, and thus also comprises sources necessary for the understanding of the revealed texts,

[535] Tyan, *Histoire de l'organisation judiciare* (1960), p. 227.
[536] In fact, though, we know of no documentation of a female *muftī* solicited by a judge, Tyan, *Histoire de l'organisation judiciare* (1960), p. 227.
[537] See typology of judge/judgment and jurisconsult/legal opinion, this Chapter Two, I.
[538] Shāfiʿī, *Kitāb al-umm*, VI, p. 219.
[539] Khaṣṣāf, *Adab al-qāḍī*, sec. 10, p. 37-38.
[540] Khaṣṣāf, *Adab al-qāḍī*, sec. 17, p. 42.
[541] Khaṣṣāf, *Adab al-qāḍī*, sec. 19, p. 42 and sec. 23, p. 44.
[542] Khaṣṣāf, *Adab al-qāḍī*, sec. 22, p. 43.
[543] Khaṣṣāf, *Adab al-qāḍī*, sec. 20, p. 42-43.
[544] Khaṣṣāf, *Adab al-qāḍī*, sec. 11, p. 39.

like consensus, Arabic lexicography and early Islamic history.[545] Thus, the knowledge referred to here and the people who own this knowledge master revelation, legal rules derived from revelation, supplementary information, and interpretative techniques.[546] The knowledge (*ʿilm*) refered to here, is the knowledge needed to understand "the quality of textual evidence and the lines of legal reasoning through which legal norms are derived".[547]

Thus, Khaṣṣāf rather than referring to general knowledge, and general scholars, was much more likely to have meant legal scholars when speaking of jurisconsults advising the judge.

Khaṣṣāf's further expression *julaṣā'ī,* literally meaning "those who sit with me [the judge]," gives spatial insights into the act of consultation. Those who were being consulted were to sit with the judge, although apparently not in the very court session (*majlis*), since Khaṣṣāf goes on to suggest that the experts of law should not deliberate with the judge right in front of the litigants.[548] While this passage does not reveal more about the seating arrangement, other than a certain (professional) closeness, no explicit hierarchy is alluded to. But the image is evoked of a collegial, joint space for deliberations that maybe signalled equalized ranks between judge and "those who sit with" him.

It is striking that Khaṣṣāf and Shāfiʿī in their passages on extrajudicial consultation do not use the technical term for jurisconsult, namely *muftī* or *ahl al-futya* (people of legal opinions). Nor is the legal product brought about through consultation, the non-binding legal opinion (*fatwā*) mentioned in either of their works. This is puzzling given that both terms were used during that time for people issuing legal opinions on request[549], and the fact that the *muftī* is the legal advisor par excellence.

[545] Calder, "Ikhtilāf and Ijmāʿ" (1983), p. 70; Lowry, *Early Islamic Legal Theory* (2007), pp. 277-278.
[546] With reference to Shāfiʿī's seminal work *Risāla* ("Epistle"), Lowry, *Early Islamic Legal Theory* (2007), p. 277-278.
[547] Hallaq, *Authority* (2001), p. 4.
[548] Khaṣṣāf, *Adab al-qāḍī*, sec. 105, p. 104.
[549] See the elaborations of Mālik ibn Anas, Aḥmad ibn Hanbal and Abū Ḥanīfa in this chapter. On Shāfiʿī's use of *ahl al-futya/muftīs* in Shāfiʿī's *Risāla* ("Epistle") Lowry, *Early Islamic Legal Theory* (2007), p. 277-294, see also Motzki, *Die Anfänge der islamischen Jurisprudenz* (1991), p. 257.

Jurists (*faqīh* or *ahl al-ʿilm*) and jurisconsults (*muftī* or *ahl al-futya*) were used not as groups of people with different expertise and speciality but rather synonymously. In analyzing Shāfiʿī's seminal work *Riṣala* (Epistle) Lowry has found out that Shāfiʿī uses "the people of *fatwā*-giving/*muftīs*" (*ahl al-futya*/*muftīs)*, the people of (legal) knowledge (*ahl al-ʿilm)*, the people of jurisprudence (*ahl al-fiqh)* and scholars (*ʿulamāʾ)* synonomously, and he concludes "it is likely that the characteristics of these groups overlap partially, if not completely".[550] Also, Shāfīʿī established the same fields of knowledge for both the jurisconsults and the jurists.[551] Again, these experts of law, when they wrote about law, were called *faqīh*; when they articulated their opinion about a particular case, they were called *muftī*.

We have established that the *muftī* and the extrajudicial authority that ought to be consulted by the judge are one and the same. The legal knowledge is thereby firmly established as a criterion of qualification for the *muftī-jurist*.

While Shāfiʿī does not explicitly state that a *muftī* must be capable of *ijtihād*, he nonetheless enumerates the branches of knowledge in which one must be proficient in order to qualify as a *muftī*. These fields of knowledge are precisely those in which the *mujtahid* must be proficient, and they include knowledge of the Qur'ān, of the Prophet's Sunna, the Arabic language, the legal questions subject to consensus, analogy (*qiyās*), Shāfiʿī's preferred art of interpretive legal reasoning.[552] These fields of competence are precisely those that Shāfiʿī set for the *mujtahid*, the one qualified to perform *ijtihād*, who is at one and the same time the *muftī*. [553] The *muftī* thus evidently needs to perform *ijtihād*.

Also, Khaṣṣāf required that those that ought to be solicited for their legal opinions need to be *mujtahids.* Though he does not say so explicitly, he articulates the idea that the jurists shall assist the judge in his exercise of *ijtihād* (sec. 17), or alternatively, offer their *ijtihād* in case the judge cannot come to a result through *ijtihād* himself (sec. 20, sec. 22). Throughout the book, Khaṣṣāf's commentator Jaṣṣāṣ clarifies that the advising jurists are "the people of *ijtihād*".[554]

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[550] Lowry, *Early Islamic Legal Theory* (2007), pp. 277-294, especially p. 283.
[551] Shāfiʿī, *Kitāb al-umm*, VI, p. 219, VII, p. 274; Hallaq, "Ifta' and Ijtihad in Sunni Legal Theory" (1996), p. 33. Shāfiʿī, *Kitāb Ibṭāl al-Istiḥṣān*, pp. 492, 497; Hallaq, *Authority* (2001), p. 66.
[552] [552] Shāfiʿī, *Kitāb al-umm*, VII, p. 274; Hallaq, "Ifta' and Ijtihad in Sunni Legal Theory", (1996), p. 33. Shāfiʿī, *Kitāb Ibṭāl al-Istiḥṣān*, pp. 492, 497. Hallaq, *Authority* (2001), p. 66.
[553] Hallaq, *Authority* (2001), p. 77.
[554] Jaṣṣāṣ, *Adab al-qāḍī*, pp. 42-43, 101-102, 105, 106; Hallaq, *Authority* (2001), p. 77.

Later, in the fifth/ eleventh century Shāfiʿī jurists al-Baṣrī (d. 436/ 1044), Māwardī, al-Shirāzī (d.476/1083) but also Mālikī jurist al-Bājī (d. 474/ 1081) clearly linked the art of giving *fatwās* (*iftā'*) to interpretive reasoning (*ijtihād*), or list the requirements for *muftīs* as identical to those of the *mujtahid*.[555] They unanimously agreed that a jurisconsult had to be a *mujtahid*. More importantly, they reported that no contrary opinion was held by any of their predecessors.[556] So from the second/eighth century to the fifth/eleventh century, jurists, in order to qualify for issuing legal opinions (*iftā')*, were normatively required to be *mujtahids*.[557] *W. Hallaq* argues that in fact the art of issuing legal opinions (*iftā'*) means the very exercise of *ijtihād*.[558]

To conclude, the *muftī* has to exhibit moral, religious and legal qualifications, and is additionally required to perfom interpretive legal reasoning (*ijtihād*) when cases are not governed by authoritative texts. The *muftī*, though not literally mentioned by Khaṣṣāf and Shāfiʿī, is the same person as the extrajudicial authority that is to be consulted by the judge.

c. Eligibility Judge-Jurisconsult

In constructing (debating and creating) authority towards each other, the criteria of personal authority are normatively relevant. The criteria for eligibility set up for judges and jurisconsults refer to personal bound criteria that constitute personal authority.

Both differences and similarities in normative qualifications and eligibility are striking. As for the differences, the criteria personal status (gender and free vs slave) as well as physical integrity distinguish the *qāḍī* position from the *muftī* activity, and were less strict for the jurisconsult than for the judge. In fact, women, the disabled and slaves were considered eligible for giving legal opinions, yet not for adjudication, with the exeption

[555] Hallaq, *Authority* (2001), p. 66-67.
[556] Hallaq, *Authority* (2001), p. 74; Hallaq, "Ifta' and Ijtihad in Sunni Legal Theory" (1996), p. 41.
[557] Later, concessions on the qualificataions were made, reflecting the assumption that mujtahids no longer existed, an that the task had to fall to mujtahids whose legal activity was restricted to the application of a methodology already established by the eponyms and early grand jurists of the respective school. Hallaq, *Authority* (2001), p. 73.
[558] Hallaq, "Ifta' and Ijtihad in Sunni Legal Theory" (1996), p. 34.

of the Ḥanafī school making (confined) space for women in adjudication. For the judge, the criteria of eligibility are more exclusivist, and also clearer set up and more systematized than for the jurisconsult. Stricter criteria for the position of the judge were probably established because there was a heightened sensitivity for two issues: Public office of the judge, and closely linked, enforceability of law. Criteria for the position of judge as a state official, delegated by the caliph to make binding law for the litigants in the Muslim community were formalized and stricter than for the jurisconsult as an independent legal scholar issued legal opinions that were, however persuasive, *per se* non-binding. The concessions made for the sphere of consultation, as compared to the criteria for judges, can be explained with the opinion-giving side not being in public adjudicative office: Neither do jurisconsults need to be fully legally capable to enforce their opinion, nor do they need to establish any facts. Also, since consultation is not bound to a public office seems to reduce the warnings about the dangers of corruptions.

Despite these noteworthy normative distinctions that makes the judiciary more exclusivist compared to the jurisconsults, there is no indication anywhere in the sources that the restrictions on gender, ableism and condition of freedom elevated the *qāḍī's* authority over the *muftī's*. Explicitly excluded from both *qaḍā'* and *iftā'* over the Muslim community are non-Muslims, though they are free to dispense justice in their religious communities.

Moral-religious suitability and legal qualifications of judge and jurisconsult are prime for the formation of their respective authority.

Piety does much to strengthen the authority of judge or jurisconsult, and by extension, their judgment and legal opinion. Islamic hagiography is rich in reiterating piety, next to knowledge, as essential elements in bolstering the leading authorities of Islamic legal history.[559]

As for the educational background, the archetype of an ideal authoritative legal model is the jurist qualified to excert interpreteive legal reasoning, the *mujtahid*[560], both for judges and jurisconsults. The comprehensive and wide-ranging knowledge attributed to the *mujtahid* is understood to be the sum of mastering Qur'ān, Sunna, legal opinions forming consensus, customary law, and the Arabic language, without which no understanding of Islamic law is thinkable. Slightly later, Shāfiʿī jurist and legal scholar Māwardi (d. 1058)

[559] Tomeh, "Persuasion and Authority" (2010), p. 148.
[560] Hallaq, *Authority* (2001), p. 24.

explicitly predicated both the art of issueing legal opinions (*iftā')* and the art of adjudication (*qaḍā')* on the attainment of *ijtihad*. [561]

While these criteria are required for the jurisconsult, exceptions can be made, according to the Ḥanafīs, to the level of legal knowledge for judges. Having said this, Ḥanafī legal texts of the formative period still hold on to the judiciary being able to master the disciplines of the law, additionally require the skills of interpretive reasoning (*ijtihād*). Therefore, I would argue that legal qualifications and knowledge of judge and jurisconsult in Ḥanafī legal thought are not *per se* the dividing line of the authority of judge and jurisconsult vis-à-vis each other. It cannot be said, for the formative period, that the *muftī* solved, or attempted to solve, new and difficult cases, while the *qāḍī* merely applied the solutions in his court. [562]

The example of the relationship between judges and jurisconsults in Germany in the 17th and 19th century shows the persuasive effects the authority of a jurisconsult can have on a judge, even a learned one. The knowledge of the jurisconsult surely persuaded a non-jurist, lay judge, but more importantly, even legally highly qualified judges were successfully persuaded by extrajudicial authority, as scholar of German legal history *Falk* exemplarily shows for Germany: The institution of the *Aktenversendung* (where difficult legal cases where sent from the courts to the law professors at law faculties for them to offer legal opinion for solving the case[563]) became increasingly critized in the first half of the 19th century. The criticism entailed that there was "a kind of absurdity involved", as compared to "in earlier times" as "German courts now are positioned with learned jurists" who are expected to themselves answer all legal questions (*iura novit curia*). In fact, legal knowledge of the judges of the preceding 17th and 18th century was rather modest. With these judges, professorial consultative legal opinions could have a decisive effect. Yet, so *Falk*, even with professional, legally qualified judges an advantageous effect was to be expected when the expertise of first-rank law faculties was presented to them. Though the consultative legal opinions were not normatively binding (i.e. were not imperative on the judiciary), the judge could not easily diverge from their

[561] Māwardī, *Adab al-qāḍī*, I, p. 637; Hallaq, "Ifta' and Ijtihad in Sunni Legal Theory" (1996), p. 34.
[562] Hallaq, *Authority* (2001), p. 76, w ith reference to Shihāb al-Din al-Qarāfī (d. 1285 C.E.), *al-Iḥkām fī Tamyīz al-Fatāwa 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wal-Imām*, ed. ʿIzz al-ʿAṭṭar, Cairo, Maṭbaʿat al-Anwār, 1967, 29-30.
[563] On the *Aktenversendung*, see Buchda, "Aktenversendung", HRG I (1964), pp. 84-87.

legal suggestion. The legal arguments that were brought forth in the legal opinions of the legal scholars enjoyed high authority and could much effect adjudication, and no less so on the legally qualified judiciary.[564]

Consultation between judge and jurisconsult was not (solely) meant to substitute lacking legal knowledge. Instead, the motivation behind consultation needs to be searched in the perceived nature of law itself.

2. When the Judge Shall Solicit the Jurisconsult

Islamic law recognizes that some Qur'ānic rulings are definitive and therefore not open to multiple meanings. Yet, it is also acknowledged among Muslim jurists that the authoritative texts of Qur'ān and Sunna in a many ways comprise only probable textual implications, so that jurists from early on were conscious about the tenuous relationship between revelation and interpretation.[565] Where such epistemological challenges attempting to bridge revelation and interpretion occurred, judicial discretion became centre-piece. These challenges comprised ambiguous language, differing rules, and the the occurrence of cases that were ungoverned by authoritative sources of law, etc. When these textual troubles arose or when there was no appropriate legal text, uncertainty in law manifested itself and necessitated questions on authority: *Who* had the final say to decide, oppose or challenge understandings of law when legal text and legal reasoning did not produce closure (constraint by text)?

Law produces authorities, and authorities produce law. The scholarly debates of the 9th century show that uncertainty in law produced a delicate hierarchy of authorities of personae. This is remarkable given that the relationship between judge and jurisconsult was not from the outset one of superior and subordinate. Their roles in adjudication were seemingly distinct: The jurisconsult's role was to provide advice, information or suggestions on legal reasoning. The actual adjudicative decision-making authority, however, resided solely with the judge. Safeguarding the judge's autonomy in adjudication while making space for an extrajudicial authority's legal reasoning sets the scene for re-evaluating legal authority.

[564] Falk, *Consilia* (2006), p. 149-151, refering to the consultative practice of the law faculty of the university of Freiburg, Germany in the 16th and 17th century.
[565] Tomeh, "Persuasion and Authority" (2010), p. 152.

In some legal systems, adjudication knew the bench of the judges where judicial colleagues could discuss the challenging cases, balance the arguments at hand, build a majority or consensus and then come up with a decision.[566] The bench allowed for collective consultation, as a gurantee for correct judicial findings.[567] In the formative period of Islamic legal history, however, adjudication knew only the single judge who alone carried the burden of deliberation and adjudicative decision-making. Courts in Islamic adjudication are presided over by a solitary judge who pronounces judgment on his sole authority. There are no judicial benches in early Islamic judicial history, no assembly of judges and juries. Islamic schools of law were conscious that the judge could be challenged and burdened by the indeterminacy of law, the risk of making a "wrong" decision and the responsibility that would come with his judgment (in this life and in the Hereafter).[568] When the answer of what the original intent of Islamic law constituted was not readily conceivable through scripture, Islamic legal scholarship struggled with the role of individual effort of legal reasoning (*ijtihād*) as an analytic method to derive the rules of law. Where the judge needed to make use of individual effort of legal reasoning, Muslim legal doctrine foresaw a role for the jurisconsult. Thus, extrajudicial legal opinion in adjudication was closely bound up to the scope and limitations of individual effort of legal reasoning. The Ḥanafī and Shāfiʿī schools of law are particularly interesting in that their respective take on individual effort of legal reasoning (*ijtihād*) leads them to differently formulate the role of the jurisconsult in adjudication. The scope of action of a jurisconsult was primarily confined to the jurisprudential role assigned to legal reasoning outside authoritative texts - a question that the schools of law diverged on substantially.

[566] Ogorek re-constructs a critical debate on the bench (*Kollegialprinzip*) as discussed in 19th century Germany. On the one hand, legal scholar *Almendingen* (d.1827) discussed the bench (*Kollegialprinzip*) as one instrument of "indirect control" to minimize judicial arbitratriness, see Ogorek, *Richterkönig oder Subsumtionautomat?* (1986) p. 153. On the other, *Bähr* (d.1895) himself judge, critically refers to the bench comprised of seven judges of which only one is the judicial rapporteur, actually preparing the verdict. This rather constitutes an "individual character of the collective decision", Ogorek, *Richterkönig oder Subsumtionsautomat?* (1986), pp. 333-334. On the history of the judicial bench, see Chapter One, I.1.

[567] Jung, *Richterbilder* (2006), p. 90. Critically on the bench as forum of collective judicial deliberation where judicial responsibility for adjudication in abstracto is collective, while the individual judge carries only minimial personal resonsibility, see Eichenberger, *Die richterliche Unabhängigkeit* (1960), p. 246: "Hingegen bleibt er [das Verantwortungsbewußtsein] eingeschlossen in einen Gesamtwillen, der zwar höchste Verantwortung in abstracto tägt, die persönliche Verantwortung aber minimial bemisst"[567]

[568] Johansen, "Truth and Validity" (1997); Johansen, "Wahrheit und Geltungsanspruch" (1996), p. 1056-1059.

a. Judicial Consultation

The schools of law agreed on strongly recommending the judge to solicit extrajudicial legal opinions, but in which cases, in which stages of adjudication were the judges to solicit advice from jurisconsults? How is the recommendation to solicit counsel related to the indeterminacy in law? Which normative character did this counsel effectively attain? What was the judge expected to do in cases of divergence between his legal opinion and the jurisconsult's? Was the counsel of an extrajudicial authority normatively designed to restrict or enhance the autonomy of the judge in the adjudicative decision-making process?

I shall thereby connect three fields that I consider key: indeterminacies in law, the "paradox of authority"[569], namely the conflict between autonomy and authority, and the jurisconsult as guide or constraint to the judge, as related to the developing methodologies of law in the formative period.

aa. The *Ḥanafī* School

In one of the very first sections of his work, Khaṣṣāf writes on the role of consultation in adjudication, when it became of relevance for the judge and to what extent the judge was bound by it. Each of Khaṣṣāf's brief passages is followed by summarized comments and clarifications of legal scholar Jaṣṣāṣ.[570]

(1.) When to Solicit Consultation

First, Khaṣṣāf reiterates the Islamic legal principle that a judge is recommended to solicit extrajudicial counsel before issuing a judgment.

Sec. 17 If the legal scholars (lit. people of jurisprudence, *ahl al-fiqh*) are present in the city, the judge should consult them.[571]

[Jaṣṣāṣ: When they arrive at concurring opinions, the judge shall adjudicate accordingly because judge and jurisconsults have jointly established consensus. If the problem at

[569] Raz, *The Authority of Law* (2009), p. 3.
[570] I am following the careful demarcation lines by editor Farhad Ziadeh in setting apart the original statements from Khaṣṣāf from Jaṣṣāṣ' statements.
[571] Khaṣṣāf, *Adab al-qāḍī*, sec. 17, p. 42.

hand required individual effort of legal reasoning (*ijtihād*) and consensus (*ijmā'*) was arrived at, the joint result shall not be violated].[572]

As a rule of adjudication, the judge is advised to request consultation from the legal scholars of his city. A judge should reach out to the scholars, a quality Khaṣṣāf later (sec. 107) discusses as a degree of perfection. No further qualification is made as to the contents, laws or difficulties of the cases that require consultation – the legal local scholars' mere presence in the city suffices to solicit the jurisconsults' counsel. Khaṣṣāf speaks of jurisconsults in the plural, but it remains open whether he speaks of a series of individual members or a body of scholars, whether the plurality of legal scholarship or one pre-unified legal opinion is meant. The jurisconsults' authority seemingly is collective authority. Jaṣṣāṣ elaborates on his understanding of judicial and extrajudicial authority concurring in their legal analysis of the case: When the case necessitates individual effort of legal reasoning beyond the legal text (*ijtihād*), and both judge and jurisconsults arrive at the same legal opinion, they jointly establish a consensus, which the judge should not go against in his judgments. In fact, legal theory only recognized one principle by which a jurist's probable interpretation could become a rule over time: the institution of consensus (*ijmā'*).[573] As long as the community of Islamic scholars generated no consensus on a particular question of law, all positions held by qualified interpreters of the law (*mujtahid*s) could only be deemed to be equally correct in practice.[574] Cleary, joint deliberations are considered better than the solitary deliberations of a judge.

The next two cases take up the much more thorny issue of disagreement between judge and jurisconsults on legal rulings.

[572] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 17, p. 42.
[573] On the methodological relationship of independent legal reasoning (*ijtihād*) and consensus (*ijmā'*) see this Chapter Two, V.2.b.
[574] Fadel, *Adjudication in the Mālikī Madhhab* (1995), p. 221, note 24. There was general agreement, even among those who believed there was a "correct" rule for every case, that in the controversial areas of the law, human beings did not have access to which opinion was actually the correct one. Therefore, in practice everyone agreed that all opinions issued by qualified interpreters of the law were equally likely, ultimately, to be the correct rule for the case at hand. See Zysow, *The Economy of Certainty* (1984), p. 460-1.

Sec. 18 When they disagree in opinion, he shall judge according to what he thinks corresponds more closely with the truth. [575]

[Jaṣṣāṣ: If the judge is a *mujtahid* (someone qualified to exercises individual effort of legal reasoning) he is allowed to adhere to his opinion, even if he stands in disagreement with the individual effort of legal reasoning of the jurisconsults.[576]

Sec. 19 If the jurists (*fuqahā'*) of the city have consensus of opinion concerning an issue and the judge has a different opinion, the judge should not hasten in making his decision. He should get the opinion of other legal scholars in writing and request their counsel. Then he should arrive to his best-possible opinion and act accordingly. [577]

[Jaṣṣāṣ: Consensus of one local legal community does not prevent the judge from exercising individual efforts of legal reasoning. Consensus in his own city does not prevent the judge from seeking consultation from jurisconsults in other cities. After he has heard the opinions from the cities, he shall discern (*naẓara*) and act accordingly. And he is not required to write to all cities, as this prevents the implementation of adjudication. If he were to write to all cities, he would not be able to adjudicate anymore.][578]

It is key that disagreement on points of law between judge and jurisconsult are decided in favor of the judge. The judge is encouraged to follow his own legal reasoning and decide according to what he considers "corresponds more closely with the truth" (sec. 18). The backing of the judge to hold on to his legal reasoning is qualified by Jaṣṣāṣ in a critical way, namely that the judge himself is qualified to exert legal reasoning, i.e. is a *mujtahid* (sec. 18). In this case the verdict is left to the judge, and his judicial autonomy is not to be submitted to the authority of the jurisconsults. As a rule of adjudication, the qualified judge should adjudicate according to what he considers to be the best judicial option (sec. 19). When disagreement between judge and the local scholars acting as jurisconsults occurs, you have two equally sound and valid legal opinions that differ in result: the judge's and the jurisconsults'. The consensus of the jurisconsults of the city

[575] Khaṣṣāf, *Adab al-qāḍī*, sec. 18, p. 42.
[576] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec.18, p. 42.
[577] Khaṣṣāf, *Adab al-qāḍī*, sec. 19, p. 42.
[578] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 19, p. 42.

requires the judge to reconsider his opinion, but do not compel him to change his opinion. The judge is not pushed into adopting another opinion, if no persuasive arguments are presented by the jurisconsults. The consensus of the local scholarly community does not trump over the judge's deliberations: the judge maintains his autonomy and has the final say over adjudicative rulemaking. Instead, the judge is advised to continue to meticulously deliberate, and not rush for a decision and request opinions also from outside the local legal environment they all are accustomed to (sec.19). Legal consultation in oral or written form was on par.[579]

It emerges that consultation is closely linked to consensus, a key method of Islamic legal theory[580], a point that will refered to again in underlining the link between consultation and legal theory[581]: In matters that are not bound by consensus, legal reasoning (*ijtihād*) is needed to fill the gap of a missing text. This interpretive activity, for its part, shall be accompanied by the consultation with other jurists. If they concur in opinion, the judge shall adopt this joint consensus between judge and jurisconsults. If they dissent in opinion, however, the judge shall deliberate, balance the arguments and decide according to what he considers to be the right decision. This possibility is only open, however, if the judge himself belongs to the people who can exercise *ijtihād*. Then he shall follow his own opinion which is valid because it was arrived at according to sound methodology. Hence, consensus between judge and jurisconsults, once established, shall not be violated by the judge. But the consensus of the jurisconsults, does not prevent the judge from seeking further for the more appropriate result, i.e. for engaging in further consultation or make his decision.

In the previous three statements (sec. 17, 18, 19), the judge was advised to consider consultation but adhere to his opinion, if reached on the basis of sound *ijtihād* and if he considers his opinion closer to the truth. These two requirements indicate two large fields of indeterminacy in law: What is the basis for sound legal reasoning (*ijtihād)* in the

[579] On the written requests for judicial consultation see, for instance, the story of qāḍī Makhẓūmī of the city of Basra, Wakīʿ, *Akhbār al-quḍāt*, II, p. 142, see Chapter Three, I.3.a. On written requests during the times of the Umayyads, see Crone/Hinds, *God's Caliphs* (1986), p. 46-47. On governeurs seeking written advice of judges, see Schneider, *Das Bild des Richters* (1990) p. 111 with further references. Badry, *Die Diskussion um den islamischen Beratungsgedanken* (1998), p. 173 with further examples of written consultation during Islamic legal history.
[580] See Schneider, *Das Bild des Richters* (1990), p. 222.
[581] See in this on consultation and consensus, Chapter Two, V.2.b.aa. (2.)

absence of authoritative sources of law, and how can you assess if your interpretation and application of law "corresponds more closely with the truth"? This question on sound interpretation in the face of indeterminacy in law shall be key and returned to soon.

The following statement of Khaṣṣāf is significant for assessing the authority and autonomy of the judge vis-à-vis the jurisconsults precisely when the judge has no own opinion on the case at hand to defend against the jurisconsults.

Sec. 20 When there is a problem and he consults with one legal scholar, he can follow the scholar's opinion, in case the judge has no opinion on this matter.[582]

[Jaṣṣāṣ: If a judge has an opinion, he cannot follow someone else's opinion. Take the example of the direction of prayer (*qibla*): When you see someone praying in the wrong direction, you cannot follow him. If you have an opinion, and belong to the people of *ijtihad*, you cannot follow someone else's recognizably wrong opinion. But if he has no opinion on this matter, he can adopt the opinion of the legal scholar. If he does not know where the *qibla* is, he looks in which direction the people are praying and follows them.][583]

The rule of adjudication was that the judge is not advised to change his opinion when he has a valid one, i.e. when he knows how to exercise legal reasoning- and even less so when the extrajudicial opinion is recognizably wrong, so Jaṣṣāṣ. No following, conformism, or acceptance of a position when erroneous indication is given, is authorized. Again, the qualified judge's autonomy to deliberate and decide is not touched upon.
Here, however, Khaṣṣāf is clear that when the judge has no opinion and, importantly, has no indication for the erroneousness of the solicited opinion, he is encouraged to adopt another's legal opinion. Jaṣṣāṣ clarifies that if the judge does not belong to the people of *ijtihād*, he not only needs to seek consultation but also needs to adopt the legal opinion of extrajudicial authorities.

[582] Khaṣṣāf, *Adab al-qāḍī*, sec. 20, p. 42.
[583] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 20, p. 42-43.

The only time a judge is advised to adopt a jurisconsult's opinion, is when he himself has none. When the judge does not have an opinion of his own in a case that causes him difficulties to deliberate upon (sec. 20), Jaṣṣāṣ here refers to leading Ḥanafī legal scholar and judge Abū Yūsuf. Abū Yūsuf says that where the judge has no opinion of his own, the opinion of the other person becomes like his *own* opinion. His decision in the absence of his own opinion and basing his opinion on the opinion of another person is like giving decision with his own opinion. Thus, when the judge had no opinion of his own, he was advised to adopt the jurisconsult's opinion and turn it into his own. The judge is not asked to submit to the authority of the jurisconsult, but asked to turn the jurisconsult's opinion into an own, autonomous decision – a construction to safeguard the previously established principle of adjudicative autonomy.

But what when the judge has exerted his own legal reasoning, and yet is conscious that the person he is consulting is the better jurist? Should he follow his opinion because of the other's wider knowledge or repute?
Sec. 21 When the man he is consulting is better at legal reasoning (*afqah*) than the judge, yet the judge can discern (between the two possible positions of) the problem, he has to discern (*naẓara*). He has to adjudicate according to what is closer to what is correct. [584]

[Jaṣṣāṣ: The judge should discern and choose between the two possibilities, according to what is closer to what is correct, even when he has to leave his own opinion and follow the legal scholar's opinion. When he discovers that the legal scholar's opinion is closer to the truth, he cannot go back to his opinion.][585]

The answer is that the judge is not freed from making his own deliberations. The careful reasoning, the discernment of legal methods and arguments are indispensable for adjudicative obligations. But the key question is how the judge was to deal with two equally sound and valid legal reasonings that lead to different results: his legal opinion and the advice of the jurisconsults. Was he simply to follow his own, the judge's opinion, or the equally valid opinion of the jurisconsult, even if leading to a different result?
Khaṣṣāf is clear in his advice: The judge shall discern the legal opinions and then decide according to what is closer to what is deemed correct. (sec. 21) But the judge is not

[584] Khaṣṣāf, *Adab al-qāḍī*, sec. 21, p. 43.
[585] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 21, p. 43.

submitting to the jurisconsult's authority, as he is not asked to do away with his deliberations and to give up his own opinion. He maintains his autonomy in face of extrajudicial authority and adopts the jurisconsults' opinion as his own. [586] Accepting the jurisconsult's advice is not crafted in a way to circumvent the judge's own evaluational judgment, and thus autonomy. Circumventing the evaluational judgment of the judge would mean to prevent the judge from acting on his own determination of what ought to be done.[587] Here, however, it seems as if the adoption of a jurisconsult's opinion was construed in a way to preserve the judge's autonomy, and thereby also to avoid establishing a hierarchy of legal personae or allowing for a clash or authorities. The jurisconsult's opinion was not positioned to restrict the judge, but rather to guide the adjudicative process.

Jaṣṣāṣ reveals that the question of the "better *ijtihād*" caused a considerable inner-Ḥanafī dispute. In sec. 21, continued in sec. 22, Jaṣṣāṣ presents the two opposing opinions on how the judge should deal with what could possibly be the equally sound, yet "better legal reasoning" of the advising legal scholar. On the one hand, Jaṣṣāṣ refers to Abū Ḥanīfa, one of the major jurists and name-giver of the Ḥanafī school, who recommends that the judge should request the legal scholar's opinion, compare it with his own and opt for the opinion that is closer to the truth. This might well be the jurisconsult's opinion, the judge consequently would leave his legal reasoning aside (sec. 21).

Renowned Ḥanafī jurists and *qāḍīs* Abū Yūsuf (d. 798) and Muḥammad Ḥasan Shaybāni (d. 803), both disciples of Abū Ḥanīfa (d. 767) argue differently, namely that the judge should not alter his legal reasoning: "If you are from the people of *ijtihad* (the people epistemologically qualified to exert individual effort of legal reasoning) you have to stick to your *ijtihād*" (sec. 22).[588] This statement effectively says that jurists exercising *ijtihād* and whose legal reasoning leads them to different, possibly contradictory conclusions, are equally right. For them, if the methods of *ijtihād* are sound, then the outcome is sound, too, and cannot be put aside by another authority. Legal reasoning based on

[586] Later, Ḥanafī legal scholar and adab al-qāḍī author Simnānī quotes this passage to refer to the Ḥanafī debate about whether lay-people are permitted to become judges. Khaṣṣāf though never mentions lay judges, i.e. non-jurist judges. Simnānī's editor rather refers to sec. 20 to recommend the judge, when he has no opinion (*ra'y*) on the matter and when he faces difficulties in deciding the case, to consult a legal scholar and adopt his opinion. Schneider, *Das Bild des Richters* (1990), p. 204.
[587] See May, *Autonomy, Authority, and Moral Responsibility* (1998), p. 131.
[588] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 22, p. 43.

ijtihād does not create certainty, and neither does the authority of a jurisconsult. As long as the judge follows sound methods of reasoning, there is no need to follow anyone else's legal opinion. Islamic jurists knew that they were engaging in an exercise of probabilities[589], which discouraged the establishment of institutional hierarchies of legal personae.
According to the latter opinion of Abū Yūsuf and Shaybānī, the judge, once he has exercised his epistemologically sound efforts of legal reasoning, has to adhere to his opinion. The jurisconsult's *ijtihād* might be sound and valid, yet is no reason for the judge to revise his judgment.

However, Jaṣṣāṣ reiterates his own position as explained in sec. 21 by referring again to Abū Ḥanīfa. Abū Ḥanīfa is of the opinion that the judge can put aside his *ijtihād* if the jurisconsult comes up with the 'better *ijtihād*' – for Abū Ḥanīfa the indicator is which legal reasoning is perceivably closer to the truth. Jaṣṣās quotes Abū Ḥanīfa (sec. 22):

"If the jurist (*faqīh*) is more knowledgeable than the judge, and his *ijtihād* is better than the *ijtihad* of the judge, then the judge can leave his *ijtihād* and can take the *ijtihād* of the jurist.
If the jurist is more knowledgeable and his opinion (*ra'y*) is better (than the judge's) and closer to the truth, and the judge finds out that the opinion of the jurists (*fuqahā'*) leads to the truth and that his opinion does not lead to the truth, he (the judge) should adopt the opinion of the jurist."[590]

For Abū Ḥanīfa the question of trumping, decisive authority is a question of the better sound reasoning of deriving the law, it is epistemologically grounded authority: The authority of the better, more substantiated argument that is closer to the truth. *In this situation, for this case* the jurisconsults's authority trumps the judge's authority. It is situative authority that can be decisive in this case, and theoretically, not in others, where, theoretically the jurisconsult's reasoning and authority might not trump. So the jurisconsult's authority is, also, a situative authority, not an institutional one. The juriconsult's authority is dependent on the contents given, not because of the jurisconsult *qua* jurisconsult. The judge does not agree to obey the authority of the jurisconsult

[589] Tomeh, "Persuasion and Authority" (2010), p. 170.
[590] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 22, p. 43.

whatever it may be. [591] The judge thus does not surrender his own autonomy and determination to the required action of the authority.[592]

In this situation, the judge determines whether the legal scholar's reasoning is better (perhaps meaning more methododologically consistent, or teleologically satisfying, or else) and "closer to the truth" than his, and he alone decides if to set aside his own legal reasoning. He alone decides the situation of trumping authority. By this, the Ḥanafī understanding has it, the jurisconsult's epistemological authority can trump the judge's, but the autonomy of the judge remains intact. It is the judge's decision how to eventually assess the jurisconsult's reasoning. This is precisely where persuasive authority unfolds: the actions persuaders characteristically seek to influence are voluntary actions, ones under the actor's autonomous control.[593]

Abū Ḥanīfa's statements are, in fact, a contribution to a much discussed question in legal philosophy on the relationship between autonomy and authority. Can authority require action and remain compatible with autonomy? [594] Authority can be read as an ability to require action, like the authority of a jurisconsult to potentially require the action of a judge. Authority thus means to influence people's choice of option, to have power over people.[595] Such an ability raises questions concerning the autonomy of the subject, here the judge, because the ability to require action does – at first sight – not seem to allow the subject to determine for himself what action to engage in. [596] Abū Ḥanīfa maintains that judicial autonomy is maintained while complying with the counsel of an extrajudicial authority, and in fact that discerning the legal reasoning in counsel itself and to allow oneself to be persuaded requires autonomy. My reading of Abū Ḥanīfa thereby is also a response to the question in how far counsel of a persuasive authority actually restricts or enhances the autonomy of the persuadee judge. Abū Ḥanīfa, I argue, allows for a persuasive authority of the jurisconsult while enhancing judicial autonomy.

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[591] The opposite case would be the judge agreeing to abide by the authority and legal opinion of the jurisconsult *whatever it may be.* This is a phenomenon H.L.A. Hart has termed 'a content independent reason', i.e. a reason for action regardless of what is called for. Hart, *Essays on Bentham* (1982) p. 254. It would lead to the surrendering of automony to the benefit of authority.

[592] May, *Autonomy, Authority, and Moral Responsibility* (1998), p. 129.

[593] O'Keefe, "Theories of Persuasion" (2009), p. 278-281 on voluntary action theories.

[594] Wolff, *In Defense of Anarchism* (1970) argues that legitimate authority and moral autonomy are logically incompatible; Raz, *The Authority of Law* (2009), p. 26-27 refutes Wolff's assumptions; Shapiro"Authority" (2002), p. 385, similar to Raz, suggests that autonomy is not violated in cases of compliance to authority. For a reconciliation of autonomy and authority see May, *Autonomy, Authority and Moral Responsibility* (1998), p. 127.

[595] Raz, *The Authority of Law* (2009), p. 7.

[596] May, *Autonomy, Authority and Moral Responsibility* (1998), p. 128.

Commentator Jaṣṣāṣ attempts to reconcile both positions, following the better reasoning or adhereing to the own sound reasoning in the face of a better one. He says that if both legal reasonings are correct, none of the two has to abandon his. “For our case”, he continues, “the judge is not allowed to leave his legal reasoning (*ijtihād)* for the legal reasoning (*ijtihād)* of someone else, if he believes that his *ijtihā*d is closer to the truth than the jurist’s (*faqīh*). And there is no difference between the two earlier cases” (sec. 22).[597]

At the end of Khaṣṣāf’s section on consultation, Khaṣṣāf confirms the authority of the judge even in the face of better learning and reminds the judge to adhere to what he considers right, even when in opposition to the opinion of the jurisconsults:

Sec. 23 The judge shall not issue a verdict that he considers wrong, even when the [consulted] jurists (*fuqahā’*) are of the opinion.[598]

[Jaṣṣāṣ: If a judge intentionally violates what is the truth, he leads astray (*fassak*), and his adjudication is not valid (*la yajūs hukmu*). The judge is not allowed to adjudicate in what he considers wrong, even though some legal scholars consider it right.[599]

Possibly aware of the influence of the jurisconsults on judges, Khaṣṣāf warns the judge to not give in to their arguments when the judge perceives them to be wrong. The arguments of the jurisconsult do not excempt the judge from deliberating himself whether the arguments are right or wrong. Eventually, the judgment emanates from the judge’s authority and he is held accountable.

Similarly, on the level of the enforcement of the judgment, the judge should only give order to enforce when he is of the opinion that there are no unclear questions left, even when another jurisconsult is of opposite opinion.[600]

Both passages support the judge in the decision he determines to take. One reason possibly is to keep the administration of justice realizable and practicable. After all, it is the judge’s task to terminate litigation.

[597] Khaṣṣāf, *Adab al-qāḍī*, sec. 22, p. 43.
[598] Khaṣṣāf, *Adab al-qāḍī*, sec. 23, p. 44.
[599] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 23, p. 44.
[600] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 22, 23, p. 43-44.

Khaṣṣāf is aware of the litigants watching the delicate interplay between judge and jurisconsults: Refering to the great jurist Abū Ḥanīfa, Khaṣṣāf recommends the presence of the jurisconsults during the court session. Khaṣṣāf yet goes on to addresses the question whether the judge should consult with the jurisconsults in the presence of the litigation parties.[601] He advises the judge not to consult in the presence of the litigants. They should not know what was being said between judge and consultant and what the basis for the judgment was. Jaṣṣāṣ elaborates that the litigants should not know how the judge came to his judgment. The jurisconsults' presence during the trial was useful to detect errors in adjudication, especially if the judge does not sufficiently know the law, yet if the wanted to solicit the consultants during the trial, he should do so after he had excluded the litigants from the court session.[602]

Khaṣṣāf seems to be concerned about the judge's authority and how the litigants will react to the deliberations with the jurisconsults. Even more key might be the actual decision-making: Will it be the judge alone, in consensus with the jurisconsults or will the judgment be based on a majoritarian vote? Later Ḥanafī jurists explained these off-the-stage-consultations as a face-saving way so that litigants would not lose respect for the judge, as Kāsānī (d. 587/1189), a later Ḥanafī jurists argued.[603] Sarakhsī (d. 483/1090) argued that deliberations in front of the litigants would distract the judge from issuing a judgment.[604] Perhaps, the covert consultations should not expose the ignorance of the judge to arrive to a judgment.[605]

These passages on judicial consultation show that the qualified judge shall always turn to and, more precisely, solicit the reasoning of the jurisconsult, and even adopt them when the judge has carefully deliberated, discerned and finally espoused as his own the

[601] Khaṣṣāf, *Adab a-qāḍī*, sec. 105, p.104. The presence or not of litigants seems to have been raised by the Ḥanafīs only; Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 172.
[602] Khaṣṣāf, *Adab a-qāḍī*, sec. 105, p.104.
[603] Kāsānī, *Badā'i' al-ṣanā'i' fī tartīb al-sharī'a*, VII, p. 12.Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 172.
[604] Sarakhsī, *Mabsūt*, vol. VIII, p. 71-72; Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 172.
[605] Badry, *Die zeitgenössische Diskussion* (1998), p. 172. See also Khaṣṣāf, *Adab al-qāḍī*, sec. 107, 108, p. 105-107.

reasoning of the jurisconsult, or differently put, when the juriconsults' arguments were persuasive enough for the judge to consider them "closest to the truth".[606]
Thereby there is no contradiction to both themes that seem significant to Ḥanafīs, and as we will see, also to Shāfiʿīs, namely to safeguard the autonomy of the judge, and to reject the idea of the judge conforming and submitting to the jurisconsult. Having said this, the jurisconsults are given ample space to exercise their persuasive authority: the power of the argument.[607]

The judge is free to turn to the argument of the jurisconsult, discer its legal reasoning, and compare it to his own. It is the power of the argument, which is non-binding and not enforceable in nature, and thus needs to appeal to the autonomy of the addressee. In short, the extrajudicial opinion needs to be persuasive to be adopted by the judge.[608] Persuasive authority unfolds in voluntary actions, ones under the actor's autonomous control.[609]

Ḥanafī legal thought encourages the judge to enjoy his autonomy in his judicial-decision making competences. And it is within the margins of judicial appreciation that the jurisconsults' communicated counsel have the potential to influence the judge. Persuasiveness excludes formal obedience, submission or compliance to an excercising authority. The legal opinion is non-binding and does not carry any sanctioning power with it. Thus a judge accepting the counsel of a jurisconsult remains free and autonomous to choose his options.

Whether or not legal consultation is followed, rests, not only in Islamic legal theory[610], with the one who requested the legal advice and who remains autonomous in taking the decision. This means that the solicited advice, despite its persuasiveness, can also be

[606] Similarly on the possibility to adopt the jurisconsult(s)' legal reasoning when the judge has examined them and considers them to be the right and best answer. Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 183, refering to Khaṣṣāf, *Adab al-qāḍī*, sec. 11, sec. 18, sec. 22.
[607] On the relationship between persuasion and argumentation, see O'Keefe, "Conviction, Persuasion, and Argumentation" (2012).
[608] On persuasive authority of the jurisconsult, see in this Chapter Two, V.2.a.aa .(1.) following O'Keefe's definition: "Persuasion is a successful intentional effort at influencing another's mental state, behaviour or action through communication in a circumstance in which the persuadee has some measure of freedom", or autonomy, O'Keefe, *Persuasion* (2002), p. 5.
[609] O'Keefe, "Theories of Persuasion" (2009), p. 278-281 on voluntary action theories.
[610] On Voluntary Action Theories and their aims at identifying the factors that influence voluntary action, see O'Keefe, "Theories of Persuasion" (2009), p. 278-281.

turned down. The behavior that persuaders characteristically seek to influence are voluntary actions, ones under the actor's control.[611] The philosophical question, in how far persuasion through counsel was actually restricting or enhancing the autonomy of the persuadee, the judge, is thus a critical one that was also addressed in the early juristic scholarship.

What is considered persuasive rests with the questioner, the judge, only he can decide of the legal reasoning offers "comes closest to the truth". For any given opinion, there are no clearly agreed standards of what could be considered persuasive to a judge.[612] Though the persuasive opinion or advice lacks the certainty of implementation, it could amount to more than a recommendation and less than a command that is hard not to follow.[613]

It becomes clear that the jurisconsult's opinion should guide the judge in his judicial deliberations in cases of uncertainty. Consultation was to improve the judgment. Extrajudicial authority was meant to remain non-binding, persuasive at best (sec. 17, sec. 20), but not imperative on the judge. The judge remained fully autonomous over the decision-making process and was encouraged to, if not adhere to the result of his individual effort of legal reasoning (*ijtihād*) then at least to autonomously decide on what he considered the more correct decision. Ḥanafīs preferred to see consultation as means of joint decision-making.[614] The only exception made was for the judge non-qualified to excert legal reasoning. In lack of an own opinion, he should incorporate the jurisconsult's opinion into his judgement-making, and make the legal opinion his *own*.

(2.) Normative Nature of Consultation: Recommendation

For Khaṣṣāf consultation is a recommendation, his commentator Jaṣṣāṣ also speaks of consultation as a recommenation.[615] Thereby the Ḥanafī position is congruent with the majority opinion of later Muslim scholars. It is actually Jaṣṣāṣ (d. 370/981) in his Qu'ānic exegisis who seems to then classify consultation as entailed in verse 42:38 and

[611] See O'Keefe, "Theories of Persuasion" (2009), p. 278-281.
[612] Kennedy speaks of "convincingness", *Critique of Adjudication* (1997), p. 90.
[613] Rabe, "Autorität" (1992), p. 383.
[614] Jaṣṣāṣ, *Kitāb aḥkām al-Qur'ān*, II, p. 49-50. Badry, *Die zeitgenössische Diskussion* (1998), p. 78.
[615] Khaṣṣāf, *Adab al-qāḍī*, sec. 108, p. 106. Refering to Abū Ḥanīfa (d. 150/ 767) Khaṣṣāf, *Adab al-qāḍī*, sec. 104, 105, p. 103-104 " lā ba's…" It does not harm, (or: there is no objection against) that trustworthy persons sit with the judge in the court session (without explicit mentioning of consultation); Khaṣṣāf, *Adab al-qāḍi*, sec. 107, p. 105 speaks of yanbaghī, mandūb.

concludes that consultation has an elevated position, as it is being mentioned with faith and the exercise of prayer. The reference to the Qur'ānic verse is meant to evidence that the believers are required to consult (*ma'mūrūn bihā*).[616] So Jaṣṣāṣ qualifies consultation in his exegesis as obligatory, but in his commentary to Khaṣṣāf's *adab al-qāḍī* as recommended.[617] *Badry* remains sceptical and questions whether *ma'mūr bihā* means that consultation is obligatory, though *amr* clearly means order.

The general depiction in later primary and secondary source material is that the majority of scholars considered consultation a) a recommendation only, and b) that the soliciting judge should not be bound by the result of the consultation: The majority of legal scholars argued in favor of the recommendatory character of consultation since they rejected the idea of conformism (*taqlīd*) of a judge.[618] *Badry* thus concurs with the overwhelming majority of Ḥanafī *adab al-qāḍī* authors who consider judicial consultation as recommended, at least according to Jaṣṣāṣ in his commentary on Khaṣṣāf.[619]

The normative nature of consultation is relevant for the question of authority: A recommended nature designates the jurisconsult as a source of authority, yet evades to fix the jurisconsult's authority as superior or subordinate. Determining the jurisconsult's authority when consultation is recommended leaves leaves this task in the autonomy of the judge.

bb. The *Shāfiʿī* School

Shāfiʿī is significannt in that he takes a more restricted approach to the role of the jurisconsult in the adjudicative process. This is in line with his understanding of legal

[616] Jaṣṣāṣ, *Kitāb aḥkām al-Qur'ān*, III, p.475; Badry, *Die zeitgenössische Diskussion* (1998), p.95.
[617] Which work was written first cannot be established today, therefore we cannot say if he shifted from recommended to obligatory or the other way around.
[618] See Badry, *Die zeitgenössische Diskussion* (1990), p. 182 citing Ibn Abī Dam, p. 64 instead of many. Judge, jurist and traditionalist ʿAbdallah Shubruma (d. 144/ 761) is reported of having said that an erreaneous judgment based on ra'y is more preferable than the judgment based on the consultation with ten scholars, Wakīʿ, *Akhbār al-quḍāt*, III, p. 86. However, Schneider argues that this report is to be seen critically as it might rather reflect the time's debates about ra'y in adjudication and in legal theory, Schneider, *Das Bild des Richters* (1990), p. 111.
[619] Khaṣṣāf, *Adab al-qāḍī*, sec. 108, p. 106; Khaṣṣāf, *Adab al-qāḍī*, sec. 104, 105, p. 103-104, sec. 107, p. 105.

theory, and juristic reasoning in particular, in which he argues for a more closed, text-based approach to the law. In the passage on "On Judicial Consultation" (*mushāwarat al-qāḍī*)[620], Shāfiʿī accords the judge and the jurisconsult adjudicative roles. He initiate his passage with the qualifications of the extrajudicial advisor and confirms the Islamic recommendation for judicial consultation. [621]

Epistemological qualifications for the jurisconsult are explicitly mentioned, the fundamental sub-disciplines of law are explicitly listed, piety is required as a form of integrity, allowing for an ethical and professional approach to texts. The person consulted should seek the truth. All these qualifications should aim at avoiding one specific fear: that there should be no one to "violate the wording and meaning [of Qur'ān and Sunna]". All interpretive action, all advice sought, all judgments made should, may not violate the authoritative texts and their meaning.

(1.) When to Solicit and When to Accept Consultation

In what now follows, Shāfiʿī explains under which strict conditions the judge has not only to request the jurisconsult's advice but also to accept it. Significantly, Shāfiʿī is highly alerted that neither is to engage in 'judicial activism', meaning here adjudicative unconstrained law-making that risks violating or substituting revelation.

He should not accept (*yakbal*) advice of such a person in a case, unless he assures him that his advice is based on a binding transmission, meaning the Qur'ān, Sunna, consensus or analogy on the basis of one of the two [i.e. Qur'ān or Sunna]. Even then shall he accept the advice only when he fully comprehends it, has fully persuaded himself of it and can follow [the reasoning]. [622]

Shāfiʿī, much more then Khaṣṣāf, sets guidelines for accepting advice: Advice has to be based on binding transmission, law has to be derived from authenticated sources, analogy be based on text. Text is highlighted in Shāfiʿī's understanding of generating law, a point that becomes crucial for his methodological approach to law and a main critique against th Ḥanafī school who rather leans towards the rationalist than the textualist approach.[623]

[620] Shāfiʿī, *Kitāb al-umm*, VI, p. 219.
[621] Shāfiʿī, *Kitāb al-umm*, VI, p. 219, cited and discussed above under the eligibility of the jurisconsult, Chapter Two, V.1.b.
[622] Shāfiʿī, *Kitāb al-umm*, VI, p. 219.
[623] For the development of the schools and the rationalist vs textualist approach, Chapter Two, II.

The capability of persuasively discerning the text is central in assessing whether the advice of a jurisconsult has validity for the judge, and whether the judge can follow the advice in his adjudicative decision-making.
Shāfiʿī does not want to see an interference of the jurisconsult in the judge's adjudicative autonomy. The jurisconsult should not act as a constraint to the judge. Normatively, the judge is not accountable in any way to the jurisconsult.
Shāfiʿī pleads to the judge's own faculties of comprehension, and cautions him to adopt the opinion only when the judge himself is convinced of the sound reasoning substantiating the advice. Shāfiʿī wants to keep intact the judge's authority and autonomy. The judge himself decides if he adopts the jurisconsult's advice. Shāfiʿī continues:

Additionally, he shall, even when in this way understood the advice, only then adopt it when he has asked him about a further interpretation. If there is no other interpretation or when it has to do with a tradition about whose transmission (*naql*) no disagreement exists, he shall accept the advice. If, however, the Qur'ānic text offers two interpretations or if the tradition is transmitted in different ways or if the wording of the Sunna opens different interpretations, he should act only then according to one of the interpretations after he has found evidence in Qur'ān, Sunna, consensus or analogy which shows that the opinion he chose as basis for his decision is binding and more adequate than the one he left out.
He should approach similarly with analogy. He shall only then base his decision on analogy when it is more suitable than Qur'ān, Sunna or consensus or when it is more suitable than the opinion he left out. He is forbidden to divert from this and to say: 'I consider this to be more juristically preferable (*istaḥsantu*)'. Because if he dares to say: 'I consider this to be more juristically preferable', he will also permit himself to make religious law (*yusharriʿa fī al-dīn*) (*sic!*). [624]

The fear of the judge making religiously informed law outside of sound methodology (*uṣūl*) is key for Shāfiʿī. He cautions against the Ḥanafī method of reasoning according to juristic preference (*istiḥsān*). Juristic preference as well as discretion (*raʾy*) as methods of legal reasoning favored by the formative Ḥanafī jurists Abū Ḥanīfa (d. 767) and

[624] Shāfiʿī, *Kitāb al-umm*, VI, p. 219.

Moḥammad Ḥasan al-Shaybānī (d. 805) are sharply criticized and rejected by Shāfiʿī as an unconstrained use of human reason inappropriately substituted for revelation[625], and in breach of (strict) analogy.[626]

Shāfiʿī saw the necessity to restrict interpretative legal reasoning (*ijtihād),* here used as a generic term, to analogy. According to Shāfiʿī, the Iraqi jurists got their understanding of *ijtihād* wrong because they did not rely on authentic texts and they folded pragmatic, atextual arguments into their reasoning. Instead, Shāfiʿī demanded that legal reasoning shall be employed as analogy. This way, legal reasoning would require some similarity (ʿ*illa*) between the fact pattern of a known, original ruling and the fact pattern of a novel question that justifies the application of the original ruling.[627] An argument by analogy used in law-making, involves interpreting the purpose and rationale of existing legal rules. Thereby, analogy could be used in law-making to show harmony of purpose between existing laws and a new one – rather than using juristic preference, as the Ḥanafīs would have it.

Shāfiʿī is more restrictive than Khaṣṣāf in that consultation strictly needs to be based on binding text or precedent as entailed in the authoritative texts of Qur'ān and Sunna, including consensus and analogy. Shāfiʿī was self-conscious about the inherent challenge of multiple interpretations in law, of disagreements on transmissions, in short, about uncertainty in law. Shāfiʿī tried to respond to this uncertainty by stressing the importance of establishing the sources of law, namely Qur'ān, Sunna, consensus and analogy as a hierarchical order that was to aid in developing a legal theory of Islamic law. Later, this ordering came to be the generally accepted sources of law by all schools.[628] But were the order of sources inevitably left room for disagreement, consultation was required. Yet, in comparing the judge's and the jurisconsult's legal reasoning, Shāfiʿī's hierarchy seems clear:

[625] Lowry, "Al-Shāfiʿī" (2010), p. 235.
[626] Kamali, *Principles of Islamic Jurisprudence* (2003), p. 2. See the discussion on the development of Islamic law, Chapter Two, II.
[627] Kamali, *Principles of Islamic Jurisprudence* (2003), p. 265.
[628] Critically assessing Shāfiʿī's role in this ordering, particularly Hallaq, "Was Shafiʿī the Master Architect" (1993).

Likewise he is forbidden to simply defer to [the authority of] jurist of his time (*an yuqallida*), even when he seems more intelligent and more educated to him. Because he shall judge only on the basis of his knowledge. [629]

Again, the authority of the judge is central. The basis for his judgments is his knowledge, this includes also the knowledge he has generated with the help of the jurisconsult. Shāfiʿī is eager to stress that the jurisconsult's opinion does not replace the judge's. Rather, the autonomy of the judge is to remain intact throughout. Legal conformism, in the sense of following someone else's authority withouth evidence for the case is something rejected by Shāfiʿī.[630] A perceived higher degree of intelligence and education are not reasons that sanction the judge to submit his authority under the jurisconsult's. Only the Prophet's opinion can be adopted without painstakingly revising all possibilities of precedent and evidence:

I have ordered (*amartuhū*) him to consult because the consultant (*al-mushīr*) can draw his attention to something he might overlook, can point him to a tradition that he might not know. God did not allow to simply defer to the authority (*yuqallida*) of any consultant, unless it is the Prophet."[631]

Shafīʿī now clarifies his understanding of consultation: The juriconsult shall act as a guide to the judge, pointing out any information or reasoning necessary for the judge's decision-making process. Compared to Khaṣṣāf, Shāfiʿī is more adamant about stressing the basis for a consultative opinion: "only if" based on binding law can the consultant's opinion be taken into consideration and serve as a guide for judgment.

Shafiʿī cautions the judge to incorporate the opinion of the jurisconsult only when the judge himself recognizes it as his own knowledge that obliges him to arrive at a certain decision. He thereby refers to knowledge sought on possible interpretations of the Qur'ān and the Sunna or the authenticity of traditions. The fact that the jurisconsult might be more knowledgeable than the judge is a reason to consult him but not a sufficient reason to adopt his opinion.

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[629] Shāfiʿī, *Kitāb al-umm*, VI, p. 219.
[630] El Shamsy, "The first Shāfiʿī" (2007), p. 303 on Shāfiʿī's early understanding of conformism (*taqlīd*): to accept a position without evidence.
[631] Shafiʿ, *Kitāb al-umm*, VI, p. 219.

The purpose of soliciting counsel is thus not to make the judge follow an epistemologically higher authority and to subjugate the judge under the authority of the jurisconsult. Instead, hitherto unknown legal aspects, evidence or traditions, so far unknown to the judge are to be made available to the judge. Legal conformism, however, as rejected by Shāfiʿī comes about when the legal opinion of the jurisconsult is not adopted for its content but only for a belief in formal authority, in the status of the jurisconsult.

Shāfiʿī is cautious about this fine line distinguishing between legal conformism (which he rejects) and seeking for persuasive arguments in the legal opinions of others, as an acknowledgment of the epistemological challenges of "finding" law that even the most learned jurist can encounter. The judge, after all, is always required to make inquiries – his verdicts carry the power of coercion and thus he needs to reassure himself of the law they are based on.

(2.) Normative Nature of Consultation: Partly Recommended, Partly Ordered

The formulation "I have ordered him to consult" raises a couple of significant and differing aspects regarding the normative nature of the consultation. So far, and with particular reference to Khaṣṣāf, we have spoken of consultation as a recommendation with no binding normativity.

The transition from soliciting counsel as recommendation to soliciting counsel as obligation raises novel questions: Does the counsel transit from persuasive to binding? And does the jurisconsult's advice then become content-independently relevant, binding, to be followed because the jurisconsult *qua* jurisconsult articulated his opinion? Does this change the authority of the jurisconsult from persuasive to binding?

In her analysis of Shāfiʿī's take on the normative character of consultation, *R. Badry* concurs with the majority opinion that the principle of judicial consultation is recommended only.[632] *I. Schneider*, however, argues that Shāfiʿī speaks of consultation as partly recommended and partly obligatory.[633]

[632] Badry, *Die zeitgenössische Diskussion* (1998), p. 94.
[633] Schneider, *Das Bild des Richters* (1990), p. 223.

There is a dispute about whether Shāfiʿī made a clear normative classification according to the later standadarized five categorizations of normativity (*aḥkām al-khamṣā*).[634] Yet, in *Kitāb al-umm*, *Badry* argues, that he seems to favor the voluntary character of consultation.[635] Literally he says: "I recommend (*uḥibb*) the judge to consult …" or "I want that the judge to consult".[636] Badry's statement is true, but incomplete: While Shāfiʿī initiates the section on judicial consultation with "I recommend", he finishes the section with "I order him" (*amartuhu*)". For Shāfiʿī the normative character of the consultation seems to shift.

Shāfiʿī discusses consultation on three levels. He first recommends to seek advice and specifies when and who to ask for advise. He then discusses when to adopt the solicited advice. And finally, he speaks about when advice is not recommended but ordered. Shāfiʿī speaks of consultation first as partly recommended, then as partly ordered.[637] Shāfiʿī starts off with recommending consultation but he ends on a more definitive note obliging consultation. [638] The transition is implied by explanations on multiple possible interpretations, possibly all equally valid, or disagreement about the validity of a legal tradition. This pluralism can necessitate an out of court opinion that offers evidence for a decision the judge considers closer to the sources and methods, i.e. "more adequate". While the cases of when to consult are determined by legal and doctrinal difficulty, it also becomes clear that in these cases seeking legal advice becomes obligatory, while in all other cases consultation is recommended (only).

A later Shāfiʿī writer is even clearer: The Shāfiʿī jurist Māwardī (d. 450/1058) argues in his *adab al-qāḍī* work, based on Shāfiʿī's, that consultation (*mushāwara*) in doubtful

[634] Schneider, *Aḥkām al-khamṣā* (1990).
[635] Badry, *Die zeitgenössische Diskussion* (1998), p. 94.
[636] Shāfiʿī, *Kitāb al-umm*, VI, p. 219. Shāfiʿī also says so with reference to the Qur'ānic *shūra* verse and the statement of Ḥasan al-Basrī. Shāfiʿī, *Kitāb al-umm*, VII, p. 86. Ansari, "Islamic Juristic Terminology" (1972), p. 296 refers to the pre-Shāfiʿī use of the formula "aḥabbu ilayya/ilaynā" instead of *mandūb* (recommended). See also Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 94.
[637] Schneider similarly speaks of partly recommended, partly ordered, Schneider, *Das Bild des Richters* (1990), p. 193, 223; On p. 193 she speaks of an obligation, not a recommendation. She points out, though, that Shāfiʿī jurist Mawārdi speaks of both recommended and obligatory, Schneider, *Das Bild des Richters* (1990), p. 223. On Shāfiʿī considering consultation a recommendation only see Badry, *Die zeitgenössische Diskussion* (1998), p. 93-94.
[638] Māwardī, a prominent Shāfiʿī jurist and judge, who commented extensively on Shāfiʿ's *adab al-qāḍi* passage concluded from Shāfiʿī's explorations that consultation was obligatory on the judge, see Mawārdi, *Adab al-qāḍī*, sec. 412; Schneider, *Das Bild des Richters* (1990), p. 99.

cases is obligatory (*ma'mūr bihā)* on the one hand, and otherwise recommended (*mandūb ilayhā*).[639]

I. Schneider argues that these two terminologies, though different in fact, mean the same[640] - though she argues that Shāfiʿī himself similarly distinguishes between recommended and obligatory instances of consultation, based on similar terminology. [641] *Badry* remains cautious and claims that obligatory (*ma'mūr bihā)* in this context is rather to be understood as recommended (*mandūb ilayhā*)[642], while Lane in his dictionary states that *ma'mūr bihā* can both mean "recommended" as well as "obligated".[643] The philological perspective thus allows multiple interpretations.

If we take it that a shift from recommendation to command had occurred than this has far-reaching consequences: The transition from recommendation to command marks the difference between following the jurisconsult's advice for its contents (recommendation) or contents-independently (obligation, command). It signals a shift from persuasive to binding.[644] This puts Shāfiʿī's writings into a different light. Though Shāfiʿī intitially maintains the distinction between soliciting and adopting the counsel by making the soliciting obligatory, and whether or not he meant the adoption of the opinion as obligatory, was debated by the succeeding jurists.[645] But the shift from recommending to obliging counsel cannot go disregarded by a change in the normativity of the counsel.

The thus transformed authoritative advice, *fatwā*, of the *muftī* is needed to rescue *qāḍī* from the ills of misapplying the law. The *qāḍī* might be willing to appeal to the *muftī* in order to avoid the burden of the malfinding of the law.[646] Perhaps any authority is better than the malfinding of the law.[647] Key to the idea of consultation is to improve the judgment.

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[639] Māwārdī, *Adab al-qāḍī*, I, p. 255 (sec. 409- consultation as recommended), see also Māwardī, *Adab al-qāḍī*, I, p. 260 (sec. 411); On the other hand *ma'mūr bihā* (obligatory) Māwardī, *Adab al-qāḍī*, I, p. 260-261, (sec. 412); I, p. 268, sec. 432. Badry, *Die zeitgenössische Diskussion* (1998), p. 95.

[640] Schneider, *Das Bild des Richters* (1990), p. 109; Schneider, "Die Terminologie der aḥkām al-khamṣa" (1990), p. 230.

[641] Schneider, *Das Bild des Richters* (1990), p. 223.

[642] Badry, *Die zeitgenössische Diskussion* (1998), p. 95.

[643] Lane, *An Arabic-English Lexicon* (1874), vol. I, p. 95-97.

[644] May, *Autonomy, Authority, and Moral Responsibility* (1998), p. 143.

[645] On the majority of scholars who regard advice not obligatory, despite the fact that Shafi literally says " I order you" (*amartuhu*). Badry, *Die zeitgenössische Diskussion* (1998), p. 95-98.

[646] On authority in order to avoid the malfinding of the law, see May, *Autonomy, Authority, and Moral Responsibility* (1998), p. 144; Rebstock, "A Qadi's Error" (1999), p. 20.

[647] See May, *Autonomy, Authority, and Moral Responsibility* (1998), p. 144.

Shāfiʿī seems to be concerned about safeguarding the autonomy of the judge. But while initially Shāfiʿī has put high hurdles for adopting the counsel, he later on made extrajudicial counsel obligatory. The instruction to carefully revise, but eventually adopt the jurisconsult's advice needs not to indicate a violation of the judge's autonomy but can actually show due respect for the judge's autonomy.[648]

The judge is to solicit advice that aims at elucidating the case. He should not blindly adopt the advice but incorporate it as his own knowledge, as a foundation for his judgment.

This is the reason for recommending, and eventually obliging the *qāḍī* to appeal to the muftī: The fear of the judge making religiously informed law outside of sound methodology (*uṣūl*) is key for Shāfiʿī. And it is the explanation for the shift from soliciting to adopting the advice, from a recommendation to an obligation.

The ambivalent wording on the nature of the counsel in Shāfiʿī's understanding, switching from recommendation to a quasi-order of the counsel is captivating– and an example of authority in its most complex version: Though the persuasive opinion or advice lacked the certainty of implementation, it could amount to more than a recommendation and less than a command that is hard not to follow.[649] The counsel could attain persuasive force.

By recommending, even obliging to solicit advice and yet by warning against legal conformism, Shafiʿī can be read as argueing that legitimate extrajudicial authority and judicial autonomy are not incompatible. [650] The judge can solicit the opinion of an extrajudicial authority, even incorporate it into his judgment and still remain autonomous. Acting on advice may be a deliberate act relying on the assumption that the arguments are meticulously revised.[651]

At the same time Shāfiʿī cautions that the relationship of judge and jurisconsult should not entail that the judge acts on expert advice when he knows it to be wrong. In this case there is no value, but rather harm, in referring to an extrajudicial authority when the

[648] Shapiro, "Authority" (2002), p. 385: In certain circumstances, the fact that another has demanded that we act can indeed give us a reason to act. Rather than a violation of autonomy, obedience can actually show due respect for the value of autonomy.
[649] Rabe, "Autorität" (1992), p. 383.
[650] On tensions and paradoxes between authority and autonomy see Wolff, *In Defense of Anarchism* (1970). Wolff, unlike my reading of Shāfiʿī, argues that legitimate authority and moral autonomy are logically incompatible.
[651] Similarly, Shapiro, "Authority" (2002), p. 399.

judge knows the jurisconsult's opinion to be wrong. Or as legal philosoper *S. Shapiro* says: "(O)ne relies on theoretical authorities because, and only because, one wants to know what is right".[652]

b. Consultation in Cases of Uncertainty - The Link to Legal Theory

The normative role of judicial consultation in adjudication can be analyzed in light of the fundamental categories of certainty and probability in law. I shall demonstrate that the role assigned to extrajudicial authority in adjudication is conjoined with the question of juristic reasoning when text and precedent run out. I would argue that the school positions on consultation were an extended discussion on the controversies of methods to be applied in cases of uncertainty.

aa. *Ḥanafī:* Uncertainty Necessitates *Ijtihād* which Calls for Consultation

Khaṣṣāf's text in fact reflects the Ḥanafī struggle whether to base legal doctrine (and adjudication) on textual authority or human reasoning of legal authorities. Consultation cannot be assessed without the methods of legal reasoning (*ijtihād*) or discretionary opinion (*ra'y)*.[653]

(1.) Consultation and Legal Reasoning / Discretionary Opinion

Sec.10 The judge must be a scholar (*'ālim*) and judge in accordance with the injunctions of the Book of God, which have not been abrogated. If he does not find anything in the Book of God, he then should adjudicate in accordance with the Sunna of the Prophet. If he does not find anything in the Sunna of the Prophet, then he should adjudicate in accordance with the consensus of the Prophet's Companions. If there is no consensus, then he should exercise individual effort of legal reasoning based on discretion/one's opinion (*ijtihād al-ra'y*).[654]

Khaṣṣāf names the four sources of law, in order of hierarchy: 1. Qur'ān, 2. Sunna of the Prophet, 3. consensus of the Prophet's Companions, and 4. individual effort of legal

[652] Shapiro, "Authority" (2002), p. 399.
[653] Bravmann, *The Spiritual Background of Early Islam* (1972), p.192; Badry, *Die zeitgenössische Diskussion* (1998), p. 107, p. 190.
[654] Khaṣṣāf, *Adab al-qāḍī*, sec. 10, p. 37.

reasoning based on discretion (*ijtihād al-ra'y)*. His order of sources is important as it reflects on two disputed issues, criticized particulary by Shāfiʿī scholars at main intellectual adversaries of the Ḥanafīs. First, Khaṣṣāf employs individual juristic reasoning based on discretion (*ijtihād al-ra'y*) as the fourth source of law, though it was analogy (*qiyās*) that some jurists, in particular Shāfiʿī, considered the fourth source of Islamic law.[655] Second, Khaṣṣāf uses *ijtihād al- ra'y* as a noteworthy composition of two legal terms, *ijtihād* (individual effort of legal reasoning) and *ra'y* (discretion, opinion). [656]

Studying the three concepts of independent juristic reasoning (*ijtihād*), discretion/opinion (*ra'y*), and analogy (*qiyās*) from the historical perspective shows that there have been different views as to their early meanings, uses and limitations within the Islamic legal system.

The course of Islamic jurisprudence at the early, formative phase is crucial – and yet anything but clear-cut to reconstruct *ex post*: For the 2nd/8th century, Ansari has illustrated how difficult the reconstruction can be, with a lack of fixity in the technical connotations of the terms in use; some, even crucial concepts had not yet acquired a standard, technical form for their expression.[657] The use of these tems in a multiplicity of meanings by one and the same author and often in the same work thus needs to be a fact to reckon with. Despite this fluid and confusing state of affairs, the process of the terms acquiring an increasingly technical connotation becomes gradually noticeable around the middle of the second century.[658] In this sense, one could argue that the fluid state of the theoretical-legal matters is parallel to the non-formalized lines of authority between judge and jurisconsult – before their relationship becomes increasingly formalized and standardized.

[655] See for example Johansen, "Truth and Validitiy of the the Cadi's Judgment" (1997), p.7.
[656] The term *ijtihād al-ra'y* by appeared in the ḥadīth of the Prophet appointing Muʿadh as judge to Yemen (see below) and as a title of a lost work by renowned Hanafī jurist Shaybānī (*Kitāb ijtihād al-ra'y*).
[657] Ansari, "Islamic Juristic Terminology" (1972) p. 255, focusing thereafter on the difficulties and development of such important terms-turning-technical such as ḥadīth, Sunna, consensus (*ijmāʿ*), discretionary opinion (*ra'y*), analogy (*qiyās*), juristic preference (*istiḥsān*).

The three concepts *ijtihād*, *ra'y* and *qiyāṣ* were then still fluid concepts and have been sometimes used synonymously.[659] Yet, they all entail a degree of independence from text in inferring a rule. So while *ijtihād* and *ra'y* are rather wide concepts, and were used synonymously, r*a'y* is a narrower concept than *ijtihād*: *Ijtihād* includes all of the jurist's action and activity to reach a solution, for example, a jurist's efforts to authenticate hadiths, while *ra'y* denotes legal reasoning outside the textual scope of the sources.[660] Analogy is the most restrictive form of legal reasoning, employing an original textual case to a new case ungoverned by text. In this sense, analogy is, at least by Shāfiʿī, considered the most text-based legal reasoning and preferable over *ijtihād* and *ra'y*.[661] Precisely because they all come into play when text alone is not sufficient to derive law, they indicate different shades of efforts of legal reasoning.

All three concepts have in common to infer a rule of law under conditions of uncertainty in law. A main question of distinction was whether the respective method could be linked to a textual (*naṣṣ*) reference in the main sources or not. Overall, the aim was to substantiate the purpose of the Qur'ān and the Sunna beyond the text, while attempting to draw methodological lines for text-independent legal reasoning. At the one end of the spectrum, a more restrictive view saw that reference to what was considered valid text was seen as the safest way to keep out inclinations or ideology from the law-making process. At the other end, a more tolerant view necessitated independent legal reasoning (reasoning beyond text) whenever the text did not qualify as authentic (according to their standards) and thus could not serve as reference for law-making.

Khaṣṣāf does not identify the precise form of legal reasoning through *ijtihād al-ra'y*. He is likely to have refered to a Prophetic ḥadīth in which the Prophet approved of *ijtihād al-ra'y* as a way to derive law and to a now lost work by prominent Ḥanafī jurist Shaybānī, The Book of Individual effort of Legal Reasoning by Discretion (*Kitāb ijtihād al-ra'y)*.

[659] For a tour d'horizont of the use of these terms in the writings of prominent (mostly later) jurists, see Kayadibi, "Ijtihad by Ra'y" (2007), p. 74-90; "The use of ra'y is ijtihād", Schacht, *Origins of Islamic Jurisprudence* (1950), p. 105.
[660] Kayadibi, "Ijtihad by Ra'y" (2007), p. 78.
[661] Shāfiʿī , *Risāla*, sec. 1324, and generally on *ijtihād*, sec. 1312-1670, see Lowry, *The Epistle on Legal Theory* (2013), see also Schneider, *Das Bild des Richters* (1990), p. 212-213. Lowry argues that for Shafi, ijtihād and qiyās are functionally and semantically equivalent, Lowry, "The Legal Hermeneutics of al-Shafiʿī" (2004), p. 35.

[662] The combination of *ijtihād al-ra'y* was of frequent use, and signaling the exertion of discretionary opinion (*ra'y*) based on knowledge of the authoritative past (*'ilm*).[663]
By Khaṣṣāf employing *ijtihād al-ra'y* as a source, respectively method of law, instead of analogy, he affirmed his approach tolerating a wider scope of interpretation whenever possible text was too weak to be taken as basis for law.
Moreover, Khaṣṣāf employs the notion *ijtihād al-ra'y* as a combination of two legal terms, consisting of *ijtihād* (individual effort of legal reasoning) and *ra'y* (discretion, opinion). During the first/seventh and most of the second/eighth century, *ijithād* appeared frequently in conjunction with *ra'y*, as *ijtihād al-ra'y*. In this early period, whenever *ijtihād* stood alone, it denoted the "estimate" or discretion of an expert[664], i.e. the evaluation of damages in terms of financial or other compensation.[665] But when combined with *ra'y*, it meant the exertion of mental energy for the sake of arriving, through reasoning, at a considered opinion.[666]
Khaṣṣāf thus supports the notion, like many before him, to allow for "adjudication on the basis of one's own discretion", when no text or precedent can serve as rule.

In fact, *ijtihād* is one of the most important key words of the Islamic legal system – and its conception proves to also define the normative relationship between judge and jurisconsult. Its function is to allow for a dynamic interpretation of the sources while not going beyond the methodologically established and generally recognized principled of legal interpretation, so that no loophole would be made for what could be perceived as arbitrary decisions. This, however, has proven to be particularly controversial during the formative period when precisely the establishing of methodological rules and principles had been a subject to fluidity and intellectual debates between the jurists and their schools.

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[662] The term *ijtihād al-ra'y* by then had already appeared in a ḥadīth of the Prophet appointing Muʿadh as judge to Yemen (see below) and as a title of a lost work by renowned Hanafī jurist Shaybānī (*Kitāb ijtihād al-ra'y*). On *ijtihād al-ray*, see also Schacht, *Origins* (1950), p. 105, 116.
[663] Hallaq, *Origins* (2005), p. 54.
[664] Schacht, *Origins* (2005), p. 116; Schacht, *An Introduction to Islamic Law* (1964), p. 37, 46, 53, 69-71; Schacht, "Idjtihād", EI², III, p. 1026: With this meaning, Schacht argues, the term *ijtihād* has survived in the school of law of Medina.
[665] Hallaq, *Origins* (2005), p. 114 who also states that this meaning of *ijtihād* was to persist for many centuries thereafter. Further on the development of the concept of *ijtihād al-ra'y*, Hallaq, *Origins* (2005), p. 114-115.
[666] Hallaq, *Origins* (2005), p. 114.

Khaṣṣāf did not address the exact method according to which the judge was to exercise legal reasoning, if he decided to do so. But by Khaṣṣāf advising the judge to use *ijtihād al-ra'y*, he clearly identifies himself as a Ḥanafī scholar, i.e. using a wider understanding and permissibility of exerting individual efforts of legal reasoning than other schools (and especially the Shāfiʿī).

The concepts of *ijtihād* and *ra'y* are equally bound to questions of uncertainty in law. They refer to the consciousness of jurists that the law inevitably contains certain and uncertain, i.e. probable parts. The definition as put forward by later legal scholar Al-Amidi (d. 631/1233) captures the distinction of certainty and probability in law. Al-Amidi considers *ijtihād* to be the attempt of one's total effort in search of probability (*zann*), proving that the ruling is, though probable, correct.[667] All elements, in a nutshell, are provided by Al-Isnawi (d.772/1370) who explains *ijtihād* as "the expenditure of effort to arrive at and realize the rulings of the Sharīʿa, whether certain (*qat'ī*) or probable (*zannī*)."[668]

The commentary by Jaṣṣāṣ supports Khaṣṣāf's use of *ijtihād al-ra'y* as a reaction to uncertainty in law. One of the most famous narratives cited in support of the judge's individual effort of legal reasoning, or judicial discretion is elaborated on in sec. 10 (and in sec. 24, both the foundational traditions on adjudication). It is the *ḥadīth* which tells the Prophet's appointment of Muʿādh (d. 18/ 640) to a judgeship in Yemen:

- The Prophet asks Muʿādh: "By what will you judge?"
- Muʿādh responds: "By the Book of God."
- The Prophet then asks: "And if you do not find what you need in the Book of God, what then?"
- To which Muʿādh replies: "I shall decide on the basis of the Sunna of the Messenger of God."
- The Prophet asks: "And if you do not find what you need in the Sunna?"
- "Then", says Muʿādh, "I shall exercise individual effort of legal reasoning based on discretion."

[667] Al-Amidi, *Al-Ihkam*, III, p.204; See Kayadibi, "Ijtihād by Raʿy" (2007), p.76.
[668] Al-Isnawi, *Nihayat*, II, p. 232, as translated by Kayadibi, "Ijtihād by Raʿy" (2007), p.76.

Immediately, the Prophet approves this procedure.[669]

The narrative can be interpreted in many ways. One way is that it is reinforcing the notion that texts – here identified as the Qur'ān and the Sunna – are necessary and indispensable but insufficient as the sole basis for the application of law, and for adjudication. Text might need to be supplemented by discretion. Legitimacy of the judge's final decision must come from the texts, never from discretion alone – and yet, discretion needs to be recognized as valid method for adjudication.[670] It also shows that the wider notion of *ijtihād al-ra'y* has been used in an authoritative way[671], though the term itself has not been circulating widely outside this prominent ḥadīth by jurists hereafter.[672] This is probably because of the more restrictive use of *ijtihād* that prevailed later under the influence of, among others, Shāfiʿī'.

The letter of caliph ʿUmar to renowned Iraqi judge Shurayḥ (d. 78/697), as entailed in sec. 10 of Jaṣṣāṣ commentary reiterates the order of the sources of law, but also advises the judge how to proceed when the law proves to be indeterminate:

The judge should base adjudication first on the Qur'ān and if he finds a suitable injunction apply it to the case. If no suitable rule is present in the Qur'ān, he should seek his decision in the Sunna, followed by the consensus of the people (*ijmāʿ al-nās*). If none of these sources supply a rule for your problem, you have the choice to adopt one of two positions: You can exercise *ijtihād* and proceed. Or, you can postpone your decision, and consult the people of knowledge (*ahl al-ʿilm*). […] Postponing your individual effort of legal reasoning is beneficial when you request consultation.[673]

Indeterminacy in law offers two options for the judge: To exercise efforts of legal reasoning and adjudicate accordingly, or to postpone adjudication and request consultation. The jurist-judge is free to decide which trajectory to take, his decision should not be infringed on by anyone. Yet, postponement as a "retarding moment" is considered beneficial, and with it judicial consultation. The judge is advised not to hasten

[669] Khaṣṣāf, *Adab al-qāḍī*, sec. 24, p. 44.
[670] Weiss, "Text and Application" (2008), p. 391.
[671] On the debate of the authenticity of this report see Schacht, *Origins* (1950), p. 105; Dannhauer, *Untersuchungen des Qāḍī-Amts* (1975), p. 10.
[672] Wakin, "Raʿy", EI (2).
[673] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 10, p. 38-39.

with his opinion (see above sec. 19), and consulting is considered an equally adequate path in dealing with indeterminacy of the law.

In sec. 11 Jaṣṣāṣ explores further and cites another precedent, the account of when caliph ʿUmar scrutinized whether Ḥābis b. Saʿd Ṭā'ī was competent enough to be appointed as a judge of Ḥims in Syria. The judicial candidate responded that adjudication should be based on 1) Qur'ān, 2) Sunna, 3) and if he finds nothing in Qur'ān or Sunna he concluded: "In that case I shall exercise *ijtihād* and will consult my colleagues (*julasāʿī*, lit.: those who sit with me)."[674] This last sentence underlines the significance of *ijtihād* in adjudication and indeterminacies in law equally necessitate legal reasoning and consultation.

In sec. 12 Jaṣṣās refers to a report by a person called Ibn Masʿūd reiterating the Ḥanafī understanding for the hierarchy of legal sources, slightly altered in terminology but not context, 1) Qur'ān, 2) Sunna, 3) Forefathers (*ṣāliḥūn*) 4) *ijtihād al-raʾy*. Significantly, the report concludes by saying:

"None of you should say 'I fear to announce my opinion'. The lawful is clear and the unlawful is also clear. In between there are doubtful affairs. Leave the affair which puts you in doubt, and espouse which does not put you in doubt."[675]

This report picks up on the theme of fear, anxiety and burden of interpretation, also in adjudication. If adjudication is firmly based on, first, searching for a rule in the authoritative sources of law, but if necessary, second, turning to a rule that was generated though individual effort of legal reasoning, then this should be nothing to be feared. The theme of fear in adjudication, or more precisely fear in exercising individual effort of legal reasoning, is a recurring theme reflecting on the burden to adjudicate, and the burden to assess what the original intent of the law, God's law, is.[676]

However, this report is meant to take away the judge's fear: If methodologically sound, a judgment arrived at through legal reasoning beyond text is to enjoy legitimacy and

[674] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 11, p. 39.
[675] Khaṣṣāf, *Adab al-qāḍī*, sec. 12, p. 40.
[676] On the burden of adjudication this Chapter Two, IV.

validity. Doubt in deliberation is part of textual exegesis, as the clearly allowed and clearly prohibited are evident. It is the zone of ambivalent language and context that generates doubt, a warning signal before the judge is to apply a particular rule. It also means that the judge is encouraged to exercise individual effort of legal reasoning, with all burden and challenges involved. In this Ḥanafī understanding, the judge did not need an extrajudicial authority to monitor, or even restrict, his adjudication in the name of indeterminacy of law. The consciousness of the risk involved in "finding" the right law does not translate into a hesitant stance vis-à-vis the judge's adjudication in indeterminate cases of law. With these reports, Jaṣṣāṣ remains within a line of precedent that clearly encourages juristic independent effort as legal principle, as a fair discretionary judgment.[677] The judge is to benefit from this legal principle in that it translates into a normative autonomy in adjudicative decision-making – and the jurisconsult is to enhance this autonomy by supporting the judge's decision-making process.

Similarly, a Prophetic ḥadīth is brought as evidence for encouraging independent legal reasoning in cases ungoverned by revelation: "When I do not receive a revelation, I adjudicate among you on the basis of my opinion" (sec. 12). [678] Jaṣṣāṣ explains that Prophets can exercise ijtihād, when there is no revelation. But he also states that anyone can exercise ijtihād, when they belong to the "people of ijtihād" (*ahl a-ijtihād*)[679], i.e. are firmly grounded in the methodology of legal thought (*uṣūl*) and know how to derive the rules accordingly.

(2.) Consultation and Consensus

The subsequent elaborations are significant in that they reveal how questions of consensus as a method in law is related to the question of consultation.[680] In the following passages (sec. 13-16), Khaṣṣāf writes about the scope of consensus, i.e. how much room consensus leaves for legal reasoning and discretion. In particular, the question of whose consensus was of binding nature became the focal point of controversy.

[677] On *ijtihād* as legal principle, see Hasan, "Early Modes Of Ijtihad" (1967).
[678] Khaṣṣāf, *Adab al-qāḍī*, sec. 12, p. 40.
[679] Khaṣṣāf, *Adab al-qāḍī*, sec. 12, p. 40.
[680] See also Schneider, *Das Bild des Richters* (1990), p. 222.

Sec.13 When there is no consensus of the Prophet's Companions, but rather were they disagree, and were the judge belongs to the people who can discern and infer [rules] (*ahl al-tamyīz wa al-naẓar*), he shall judge by that which is closest to the truth (*ḥaqq*) and correctness (*ṣawāb*) and what he considers to be best.[681]
[Jaṣṣāṣ: The judge should be from the people who discern arguments and infer rules.][682]

Sec.14 If the Prophet's Companions (*saḥāba*) have not said anything on this matter, yet there is a consensus by the Successors of the Prophet's Companions (*tabi'ūn*), he has to adjudicate accordingly.[683]
[Jaṣṣāṣ: Consensus of the Successors of the Companions is preceded by consensus of the Companions of the Prophet and both require compliance. Thus, consensus of every era (*ahl al-'asr*) counts as evidence and is not to be violated.][684]

Sec.15 If there is disagreement amongst the Successors of the Prophet's Companions, he must rely on his own discernment and his opinion (*al-naẓar wa'l tamyīz*).[685]
[Jaṣṣāṣ: Text (*naṣṣ*) and consensus are obligatory sources. When there is no text, you refer to consensus. The judge has to discern between the sayings of the Successors. He is not allowed to violate against the consensus of the Successors and exercise *ijtihād*.][686]

Sec.16 When the Successors of the Prophet's Companions have not transmitted anything [on this question], he should draw an analogy based on previous rules and apply *ijtihād*. He should search for the correct answer and decide according to what he thinks is appropriate.[687]
[Jaṣṣās: *Ijtihād* is allowed in this case.][688]

No consensus over precedence as transmitted by the Prophet's Companions necessitates legal reasoning (*ijtihād*) (sec. 13). If no consensus by the Companions can be generated, than consensus by the Successors need to be drawn on. Consensus, be it by the

[681] Khaṣṣāf, *Adab al-qāḍī*, sec. 13, p. 40-41.
[682] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 13, p. 41.
[683] Khaṣṣāf, *Adab al-qāḍī*, sec. 14, p. 41.
[684] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 14, p. 41.
[685] Khaṣṣāf, *Adab al-qāḍī*, sec. 15, p. 41.
[686] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 15, p. 41.
[687] Khaṣṣāf, *Adab al-qāḍī*, sec. 16, p. 41.
[688] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 16, p. 41.

Companions or the Successors, requires compliance (sec. 14). If disagreement over the Successor's reports prevents a consensus, the judge is left to discern and reason (sec. 15). This is because there is no text or consensus as obligatory sources to base his judgment on. No consensus by the Companions or the Successors means that the way is free for legal reasoning, through analogy based on previous rules (sec. 16).[689]

This is a step-by-step instruction to examine whether there is consensus, and if not, to discern diverging opinions and examine all possible legal opinions before exercising legal reasoning, and then to decide according to what comes closest to the truth.
Sections 13-16 also stress that consultation and consensus are interrelated. Where there is text and consensus, they are obligatory sources of law. Where there is none, legal reasoning, and by extension consultation, are necessary.

However, many disagreements existed on discerning the legal rules as possibly entailed in the traditions of the Prophet's Companions and the Successor generation. The authoritative character of single traditions were repeatedly disputed, so that for some critics they lacked the necessary consensual degree of bindingess as an authoritative source of law. In fact, the authentication of traditions that comprise the Sunna follows a complicated methodology that knows many categories of authentication.[690]

One line of narration was delivered by the Successors (*tābi'ūn)* who are the generation of Muslims who were born after the death of the Prophet Muhammad, yet who were contemporaries of the Prophet's Companions (*saḥāba*). As such, they played an important part in the development of Islamic law and thought. The debate in Islamic legal theory focused on the degree of bindingness Successors' sayings generated. For those who did not follow the Successors, it was because they were human beings who exercised personal judgment (*ijtihād*) and were in no way different from later generations

[689] *Schneider* rightly points out the fact that while in sec. 13 consensus appears limited to the Prophet's Companions, sec. 15 prescribes that the judge should also take into consideration the consensus of the Successors of the Prophet's Companions (*tābi'ūn*), even though in such a case originally the option of discerning initially seemed to have been possible (sec. 13). Schneider, *Das Bild des Richters* (1990), p. 210.This shows that the line between binding and non-binding precedent was not fixed and that a lot depended on the weight of the argument made.

[690] The reports that enjoy the highest level of authority in terms of authentication are those that are "continuous" (mutawātir). Continuous narrations ar validated by multiple independent narrators in such a way as to preclude the possibility of the narrators would conspire to perpetuate a lie. Kamali, *Principles of Islamic Jurisprudence* (2003), p. 93-94. They can be continuous in meaning (*ma'na*) or precise text (*lafzh*).

of jurists who also exercise personal judgment (*ijtihād*). For others, the legal opinions of (some of) the followers should be considered secondary sources of law.

The disagreement on the binding character of these reports made it necessary to stress the judge's ability to discern the legal opinions (*naẓar*) out of the many ascribed sayings of the Companions and Successors (sec. 13). Sifting, authenticating and discerning their sayings (*akwāl*) became crucial when there was no consensus of the Prophet's Companions, who enjoyed priority over the Successor generation.

For the question of authority between judge and jurisconsult, this meant a further challenge for the judge, namely to discern in how he was bound by precedent, as formulated by the arguments of the Prophet and his Companions but also by the Successor generation. Though consensus of the Successors in principle bound the judge in his deliberations, disagreement on whether these accounts allow establishing legal rules widens the scope for independent legal reasoning of the judge, respectively of the advising jurisconsult.

For the legal system, the bulk of the Prophetic traditions, though not necessarily the most important ones, are of no more than probable authenticity. The interpretation of the Qur'ān and of the traditions brings to light further points of uncertainty. Finally, analogy introduces a growing body of legal rules that have no more than probable validity. This uncertainty is by no means entirely unwelcome, for it opens the door to ijtihād, to the personal effort of the expert jurist, which not only ensures him his otherworldly reward but also serves the interests of social stability. Nonetheless, the hope remains that the uncertainty within which ijtihād flourishes may ultimately be resolved by consensus, which fixes one of the competing solutions as correct. [691] Thereby, the authority of consensus of the scholars of the Muslim community as a whole effectively was so powerful as to make it a source of law that fills in *lacunae* in the scriptural sources.[692] In adjudication, the consensus of judge and jurisconsult suffices to create a consensus for this case (sec. 17) that shall not be violated by the judge.

[691] Zysow, *The Economy of Certainty* (1984), p. 493.
[692] Tomeh, "Persuasion and Authority" (2010), p. 149-150, footnote 40.

Section 16 offers an interesting gradual change in the usage and understanding of consensus vis-à-vis legal, with the tendency to confine legal reasoning to analogy. Consensus, even of the Successor generation, is prime and only then can analogy, followed by the effort of individual effort of legal reasoning be exercised. This shows that the use of *ijtihād al-ra'y* was gradually limited by extending the notion of consensus (*ijmā'*), including not only the Companions of the Prophet but also the Successors. Independent legal reasoning was possibly also limited to the the legal method of analogy, as this became a concurring form of what *ijtihād* should be in its more determined form. [693]

While the judge is bound by the primary textual sources (*naṣṣ*), Qur'ān and Sunna, he is also bound by precedent as in form of consensus. By including the precedent as generated by the followers of the Companions of the Prophet, Khaṣṣāf enlarged the legal rules the judges are bound by, and thus at first sight constrained the scope of individual effort of legal reasoning. However, where precedent could not be considered to direct the judge, he was entitled to individual effort of legal reasoning – and this consciousness for the necessity of independent legal reasoning opened the door for recommended consultation.

For the schools of law the questions of what constitutes precedent remained vital throughout Islamic legal history. For the variant opinions, traditions were brought forward. The question of the authenticity, scope and binding nature of precedent was disputed to an extent that jurisconsultation could serve to solve this normative question.

In the end, Khaṣṣāf relates the idea of consultation to the different grades of perfection in deliberation, as an aptitude of soliciting consultation.

Sec.107 Men are of three kinds: a perfect man, a half perfect man and nothing. The perfect man is he who possesses an opinion (*ra'y*) and is not dependent on any other person. The half perfect man is he who has no independent opinion but if any problem

[693] In sec. 16 Khaṣṣāf explicitly mentioned analogy as a legal method, together with the method of individual See Schneider, *Das Bild des Richters* (1990), p. 211; Johansen, "Truth and Validity of the Cadi's Judgment" (1997), p. 6. Schneider argues that the letter of caliph Umar to judge Shurayh shows that despite the early fluidity and blurred use of terminology, the elimination of ijtihād in favor of analogy indicated that tradition is a late compilation that reflects the underlying confrontation for supremacy between *ijtihād al-ra'y* and analogy, as respectively prefered by the Ḥanafī and Shāfi'ī school.

occurs consults another person competent to exercise personal judgment. Only the "nothing" is neither able to exercise his own judgment nor consult anyone else.[694]

This report is indicative about perceived perfection in deliberation. The own legal reasoning has particularly high esteem because it allows for an independence from any other opinion. It even seems that the perfect opinion is the opinion that is not even put up for disposition, that does not urge necessity for discussion with anyone else, that is not relational. Yet, Khaṣṣāf also underlines that it was considered to a high degree unwise to not seek for counsel, if one did not consider his opinion to be clearly manifested. Yet, in sec. 17 Khaṣṣāf previously had wisely advised to seek out to the legal scholars present in the city, even when the case showed no *apparent* difficulty. Read with the Islamic doctrine of recommended consultation in mind, requesting counsel is still in the zone of perfection. Consequently, there is a very harsh assessment left for those who neither generate their own opinion nor seek the counsel of another knowledgeable person.

bb. *Shāfiʿī School*: Uncertainty, restrictive approach, to control judge

Shāfiʿī's explorations on judicial consultations need to be seen against the backdrop of the legal theory he majorly contributed to, and against the backdrop of Ḥanafī legal thought. Confining uncertainty in law was surely a dominant theme in his writings, and informed his take on judicial consultation. Whether Shāfiʿi can be considered to be the founder of the Shāfiʿī school is just as much debated as his role as the founder of Islamic theory of law (*usūl al-fiqh*).[695] Both debates reveal however, that he was a foundational figure in the history of Islamic legal thought and that he made substantial contributions in the areas of legal doctrine and legal theory. Shāfiʿī is regarded as an early, possibly the

[694] Khaṣṣāf, *Adab al-qāḍī*, sec. 107, p. 105. Also in Wakī, *Akhbār al-quḍāt*, II, p. 118. A similar report is entailed in Shāfiʿī, *Kitāb al-umm*, VII, p. 86.

[695] The origin of the Shāfiʿī school and the role of Shāfiʿī himself in it has in recent decades become the subject of a renewed controversy. Schacht, Introduction to Islamic Law, p. 58 considered Shāfiʿī to be the eponym of the school who alone has laid out the principle doctrines. Shafiʿīs role and significance has been questioned by several authors, see, in particular, Calder, *Studies in Early Muslim Jurisprudence* (1993), Hallaq, "Was al-Shafiʿi the Master Architect of Islamic Jurisprudence?" (1993), and *idem*. "From Regional to Personal Schools" (2001); Melchert, *The Formation of the Sunni Schools* (1997), *idem*. "Qur'anic Abrogation Across the Ninth Century" (2002), *idem*, "The Meaning of *Qāla 'l-Shāfiʿī" (2004)*;Lowry, "Does Shāfiʿī have a Theory of 'Four Sources' of Law?" (2002), *idem*., "Ibn Qutayba"(2004). El Shamsy recently rehabilitated Shāfiʿī in that the foundational works *Kitāb al-Umm* and the *Risāla* can be ascribed to Shāfiʿī, thus underlining his constitutive, early role in the establishment of the Shāfiʿī school. El Shamsy, "The First Shāfiʿī," (2007), p. 313.

first, Muslim jurist to compose works on legal theory, and who established a hierarchy of the binding nature of the authoritative sources of Islamic law and proposed an early approach to deriving law. Shāfiʿī offers five "layers of law", combining sources and methods: (1) Qur'ān and (authentically transmitted) Sunna, (2) consensus (of the jurists), if Qur'ān and Sunna offer no authoritative answer, (3) non-contradicted, authentically transmitted reports of the Prophetic Companions on legal matters, (4) disputed reports of the Prophetic Companions, (5) analogy based on the previously mentioned sources or methods. [696]

Shāfiʿī's achievement lies in the affirmation that the Sunna and the Qur'ān must constitute the exclusive foundations of the law.[697] This achievement was an unprecedented synthesis between the rationalists (*ahl al-ra'y*), who were reluctant to acknowledge questionable Prophetic traditions, and the traditionalists (*ahl al-ḥadīth*) who rejected concepts of human reasoning in religious matters.[698]

(1.) Consultation because of Unease with Legal Reasoning

Shāfiʿī's concern for text made him prioritize traditions of the Companions, even disputed ones, over juristic reasoning in general, even in the already confined form of analogy. This constituted the chief reason for dispute with the Ḥanafī school which has become known for establishing juristic reason as a major source of law in the absence of authoritative texts. Shāfiʿi, however, was concerned that all law be grounded on authoritative sources (*nuṣūṣ*) of the Qur'ān, Prophetic hadiths, and reports from the Prophet's Companions (*aṣḥāb*). His rationalist contribution consisted in employing discretion (*ra'y*) to a much more confined extent, namely to harmonize evident inconsistencies and to draw analogies in cases ungoverned by the authoritative sources.[699]

His understanding of the layers of the law is also of relevance for adjudication and consultation. Only when layer after layer has been investigated, and only when the layers

[696] Shāfiʿī, *Kitāb al-umm*, VIII, p. 764. El Shamsy, "The First Shafiʿī "(2007), p. 318.
[697] Hallaq, *Origins* (2005), p. 129.
[698] Hallaq, *Origins* (2005), p. 147-148.
[699] On Shāfiʿī's restrictive use of *ra'y* see Melchert, *The Formation of Sunni Schools* (1997), pp. 83-123; Lowry, "The Legal Hermeneutics" (2004).

offered various legal options, only then was a jurisconsult to be solicited. The scope of each layer within the legal theory of Islamic law, including the uncertainties they entailed, and the role of the jurisconsult thus were closely interconnected. The more uncertainty and thus possibility to interpret existed, the more necessary, the more obligatory was the role of the jurisconsult.

Ijtihād is permissible only where there is no book [Qur'ān], no Sunna and no consenus (*ijmāʿ*). It is a principle developed by man. But man can not make his opinion a source of law next to Qur'ān and Sunna. Therefore, analogy (*qiyās*) can be drawn if there is nothing in Qur'ān and Sunna. Analogy is based on these two [authoritative sources].
Would it be allowed to exercise *ijtihād* without a textual basis, people would be allowed to find the right thing (*yuṣību*) or err (*yuḫtiʿu*). But this is contrary to the methodology of law (*uṣūl*) that require compliance.[700]

This passage is rich in information in multiple ways:
It marks the transformation from *ijtihād* as the wider to analogy as the more confined form of legal reasoning. Shāfiʿī was at unease with the principle of *ijtihād*, as to his mind *ijtihād* did not entail clear rules of how the jurist should reason in cases of uncertainty. Shāfiʿī's critique of the concept of *ijtihād* developed over time: the so-called "old" (qadīm) doctrine he reportedly espoused before his migration to Egypt, and the "new" (jadīd) one that he developed while in Egypt.[701]
In an intermediate period, Shāfiʿī allowed the use of *ijtihād* only when there was no authoritative text. Later on, he completely rejected *raʿy* in favor of analogy (qiyās).[702] Accordingly, the present text is to be attributed to the final period of Shāfiʿī's work. [703]
Here, individual effort of legal reasoning (*ijtihād*) is allowed only when there is a textual basis. This textual basis can then be employed for analogy. Only in the form of analogy can legal reasoning be accepted as legal principle.[704]

(2.) Consultation to Exclude Subjective Elements in Law-Making

[700] Shāfiʿī, *Kitāb al-umm*, VI, p. 215.
[701] See for example, Hallaq, *Authority* (2001) p. 99, citing Nawawī, *Rawḍat al-Ṭālibīn*, I, p. 65. Zysow, *The Economy of Certainty* (1984), p. 465.
[702] Schacht, *Origins* (1950) p. 120, 127, "the use of *qiyās* is *ijtihād*". Often, Shāfiʿī uses *ijtihād* and analogy as synonomous, Schneider, *Das Bild des Richters* (1990), p. 213.
[703] Schneider, *Das Bild des Richters* (1990), p. 213.
[704] Hallaq, *Origins* (2005) p. 115.

Significantly, the passage addresses the subjective element in law-making ("man cannot make his opinion a source of law next to Qur'ān and Sunna"). There is the fear of judicial activism, the fear of unbound legal interpretation that is textually unconnected to the authoritative texts of Qur'ān and Sunna. Shāfiʿī's objective of restricting independent legal reasoning was, if not to ban than at least to substantially reduce the uncontrolled element of subjectivity from adjudication[705], and that therefore Shāfiʿī aimed at restricting *ijtihād* as a legal tool, and not, as the Ḥanafīs, to highlight it as a legal principle. [706]

Shāfiʿī's sub-chapter "On Consultation" (*mushāwara*) in the chapter of *adab al-qāḍī* thus can be read as an extension of his restrictive interpretation of juristic reasoning in general, *ijtihād* and *ra'y* in particular. It encapsulates the link between legal theory and extrajudicial advice in the most precise manner of its time. His explanations offer a key to understanding the normative role of incorporating extrajudicial advice in adjudication, namely to prevent adjudication outside a methodolodogy of deriving law from authoritative texts, or judicial activism, that risks to substitute revelation. Thus, Shāfiʿī sees no explicit role for independent juristic reasoning outside the literal scope of scripture within his respective theory of law.
To guarantee a regulated use of juristic reasoning and to keep out subjective elements in adjudication to a furthest degree possibl, judicial consultation needs to be based exclusively on binding law.

c. School Comparison and Conclusions

The study of the foundational writings of the Ḥanafī and Shāfiʿī schools provide valuable information on how the idea of consultative justice[707] was normatively envisioned. The findings allow us to consolidate and yet modify the basic assumption that consultation and adjudication are each part of distinct spheres: Consultation belongs to the realm of persuasion and adjudication to the realm of coercion.

[705] Schneider, *Das Bild des Richters* (1990), p. 213.
[706] Schneider, *Das Bild des Richters* (1990), p. 213, refering to Māwardī's assessment of Ḥanafī law.
[707] Becker, *Islamstudien* (1932), II, p. 313 (*Konsultativjustiz*) who spoke of the fatwa giving practice of the *muftīs* in general.

The (at times ambivalent) nature of judicial consultation allows us to make the following statements: First, it is indeterminancies in law and texts, and the jurists' consciousness for these challenges that necessitates consultation. Both judge and jurisconsult interpret the law, and both risk running the danger of error, and display awareness for the burden of interpretation and adjudication. Consequentially, judicial consultation has the effect of juridical and judicial risk distribution between judge and jurisconsult. Judicial consultation thus entails a possible conception of shared juridical responsibility. The *who* and *when* of consultation between judge and jurisconsult thus are elements of a remedy of distributing the juridical, and judicial, risk.[708]
Second, consultation creates and yet mitigates the conflict between the autonomy of the judge and the authority of the jurisconsult. Third, the jurisconsult can be conceptionalized as a guide or a constraint to adjudication – or both. The interactions of the coercive authority of the judge and the persuasive authority of the jurisconsult provide insights into the makings of Islamic law, and beyond, into the delicate concepts of authority of Law and authorities in law.

aa. Consultation as Part of Adjudication

Consultation was seen as part and parcel of Islamic adjudication. Early writings address the questions of who had to be solicited, the number of consultants, how to consult (at whose initiative, in writing or orally, in the presence of litigants or not), the voluntary or obligatory nature of solicited opinions, and, most importantly, when to request, or even adopt the extrajudicial legal opinion into the adjudicative rulemaking process. Not all these aspects were taken up with similar intensity by the early jurists, so that we are left with both thick and thin lines of argumentation.

Judicial consultation is a principle strongly emphasized: The *qāḍī* may solicit an expert of law, a *muftī* on points of law before issuing his judgment.

Criteria of eligibility and qualifications of the judge centre on legal, religio-moral, physical and educational aspects. Disputed, and in the following only diverging issue in comparison with the jurisconsult, might be the judge's qualification regarding legal

[708] On adjudication as burden and risk-distribution see in this Chapter Two, IV.

knowledge. While legal knowledge is reiterated and stressed throughout and in both schools, the lack of explict mention as a qualification opened debates about legal knowledge being important, but not constitutive. Khaṣṣāf and Jaṣṣāṣ' writings are explicit in making space for the judge who might not be qualified to exert legal reasoning (*ijtihād*). Surely, questions of authority play out differently if both legal personae are similiary qualified, or if the non-qualified judge encounters a qualified jurisconsult. In the latter case, the asymmetry in knowledge might well explain an asymmetrical relationship of authority, with the knowledgeable jurisconsult possibly being superior over the ignorant judge who reaches out to the jurisconsult to make up for his lack of knowledge. But when both are equally qualified further aspects for consultation play a role: a joint burden of interpretation and adjudication, legitimacy of the judgment in face of uncertainty of the law and responsibility before the Muslim community, and in a system of *ius divinum*, above all, God.

Eligibility and qualifications of the extrajudicial authority, the *muftī,* largely similarly address legal, religio-moral, physical and educational eligibility. Both Khaṣṣāf and Shāfiʿī require the consulted local legal scholars to have high epistemological qualifications, mastering the authoritative sources and displaying an understanding for legal reasoning. While Shāfiʿī is detailed and enumerates the qualifications of the consultant (*al-mushīr*) regarding the different sub-fields of the law, like authoritative sources, language and local custom, Khaṣṣāf makes it clear that jurisconsults must be epistemologically grounded to exert the efforts of legal reasoning (*ijtihād*). By variously addressing the extrajudicial authorities as jurists, people of jurisprudence or people of (legal) knowledge, Khaṣṣāf indicates their engagement with the law. Both authors underline that consultation should aim at seeking the truth, to the extent humans can attempt to read God's law, indicating the high responsibility that comes with pronouncing advice.

The number of jurisconsults that ought to be consulted is not a fixed one. While Khaṣṣāf speaks both of jurisconsults in the plural and singular, Shāfiʿī speaks of a singular consultant (*al-mushīr*). Thus, both options seem to have been possible. In case of a plurality of solicited jurisconsults, it remains open whether they should be solicited jointly so as to form one opinion of a body of jurisconsults, or separately and thus

possibly representing a variety of opinions. It also remains open according to which criteria to choose one or many jurisconsults amongst those present (in a city or a region).

Consultation is initiated by the judge, actively reaching out to the jurisconsult(s), which can happen either orally or in writing to them when they are located outside of the same city. By extension, neither of the authors addresses the question of unsolicited counsel, counsel given by the jurisconsults without being requested by the judge. This underlines both Khaṣṣāf's and Shāfiʿī's conceptions of the judge as anchor point in adjudication, requesting and eventually deciding how to deal with counsel.

Whether the judge ought to request extrajudicial counsel from within his own school or whether he is free to go also outside the doctrines he prefers or adheres to, is a question that remains unaddressed.[709] This might be because the schools of law were still in formation. Yet, jurists of their time were already referring to the "people of Iraq" when they largely meant emerging Ḥanafī teachings, or "people of Medina" when they spoke of Māliki doctrines. While Khaṣṣāf saw in consultation an attempt to discern legal reasoning and to approach truth in law, Shāfiʿī's writings make it clear that he was adamant about linking consultation to his elaborations and gradual restrictions of the sources and methods of Islamic law. Thus, Shāfiʿī, while not explict might have been more eager to have the judge request advice from a jurisconsult of his own own (Shāfiʿī) school, whereas Khaṣṣāf, less confined with the rules for legal reasoning, might have been more open towards a qualified legal opinion that "merely" seeks the truth.

The seating arrangement of judge and jurisconsult in the court session was explicitly addressed only in Khaṣṣāf's work. In one passage Khaṣṣāf called the extrajudicial authorities "those who sit with me [the judge]", implying a proximity to the judge, possibly being on par with him. In sec. 105 the judge is advised though, not to consult in front of the litigants.[710] Reasons for this might have been either in not offering litigants too much transparency into the makings of the judgment, and the actual hierachies

[709] Later Māwardī confirms that theoretically speaking jurisconsult and judge do not need to adhere to the same school of law, Adab al-*qāḍī*, I, sec. 427, p. 266-267. See also Schneider, *Das Bild des Richters* (1990), p. 103. Māwardī actually encourages in difficult cases to consult the people of *ijtihād* with different opinions, *Adab al-qāḍī*, I, sec. 1490-1491, p. 613-614. Badry, *Die zeitgenössische Diskussion* (1998), p. 146.

[710] Khaṣṣāf, *Adab al-qāḍī*, sec. 105, p. 104. See also discussed as eligibility of the jurisconsult, Chapter Two, V.1.b.

between judge and jurisconsult, or possibly to seek a face-saving way for the legal authorities deliberating and making decisions before the eyes of the litigants. Consultation *in camera*, i.e. when all spectators are excluded from the courtroom or before the judge in his or her private chambers is common also for other judicial systems. [711]

Throughout, the jurists distinguished two levels of consultation: to solicit a legal opinion and to adopt a legal opinion. The judge soliciting a legal opinion is a recommendation that both authors reiterate. Khaṣṣāf unconditionally recommends consultation, it suffices that the legal scholars are present in the city for the advice to be solicited. Even scholars outside the city should be written to in order to solicit their legal opinions. No perceived legal difficulty needs to have caught the attention of any of the actors involved to set off consultation.

According to Shāfiʿī, the judge was required to seek legal advice *only when* he was unable to reach decisions for the more difficult cases presented to him in the courtroom[712],when authoritative sources and legal traditions offered no textual answer. Compared to Shāfiʿī who qualifies the cases for consultation to cases where legal interpretation is necessitated through the lack of text, Khaṣṣāf's recommendation for consultation was not conditioned, possibly aware that interpretation takes place no matter how supposedly clear or doubtful the text.

The most evident differences between the two authors are on the level of adoption legal opinions by jurisconsults:

For the Ḥanafīs there are two conditions that encourage to not only solicit but also adopt the jurisconsult's opinion: 1) when the judge is not qualified to exercise the efforts of independent legal reasoning (*ijtihād*); 2) when the jurisconsult offers the better legal reasoning (according to Abū Ḥanīfa, while Abū Yūsuf and Shaybānī prefer the judge to stick to his own legal reasoning).

[711] Briefly on reservations against consultations, or deliberations, helt in public, see Jung, *Richterbilder*, 2006, p. 90. Chief arguments against public consultuation were that the impartiality and quality of the judgment would be affected by the presence of the public. On the pros and cons of *in camera* consultation, see Eichenberger, *Die richterliche Unabhängigkeit als staatsrechtliches Problem* (1960), p. 246. In Switzerland, judicial deliberations are held in public.

[712] See also Hallaq, *Authority* (2001), p. 77.

The adoption of the opinion of a jurisconsult shall be required in case the judge is not skilled to exercise *ijtihād*, i.e. cannot arrive to an own legal reasoning. In this case, the judge should adopt the legal opinion of those consulting him, i.e. conform to the legal opinion of the jurisconsult (*taqlīd*). This position seems to be a primarily Ḥanafī one[713]: Khaṣṣāf refers to school eponym Abū Ḥanīfa in that the decision shall depend on the level of knowledge of the judge and the consultants.[714] Khaṣṣāf thus states that when a legal problem occurs the judge who seeks consultation, shall adopt the jurisconsult's legal opinion if he does not have one himself (sec. 20).[715]

For Shāfiʿī, the question of the judge who is not capable to exercise *ijithād* is not addressed. The Shāfiʿīs established that the judge needs to be qualified to exercise independent legal reasoning and normatively made no room for exception. For *I. Schneider*, this goes to prove that the Ḥanafīs have a more pragmatic approach to adjudication. After all, they provided the majority of judges to the early Abbasid judicial system[716] and perhaps had to lower their standards concerning the criterion of *ijtihād* to make sure to get as many of their school followers into the judiciary as possible. *Masud*, *Peters* and *Powers* though affirm that there was no lack of qualified jurists for the office of judge during the early Abbasid period.[717]

Another case for adoption is based on an inner-Ḥanafī dispute, namely whether the judge's methodologically sound and valid reasoning can be abandoned in favor of the jurisconsult's equally methodologically sound and valid reasoning, yet that leads to a different and possibly better result. While one opinion (by Abū Ḥanīfa) encourages the adoption of the "better" legal opinion, another opinion (Abu Yūsuf and Shaybānī) disapproved the change in legal reasoning: Methodologically sound legal reasoning cannot be abandoned.

[713] Badry has examined this exception also in the work of the succeeding Ḥanafī jurist and adab al-qāḍī author Simnānī, *Rauda*, I, sec. 29, p. 33 and the Mālikī scholar Ibn Farḥūn, Tabṣira, p. 64-65. Badry, *Die zeitgenössische Diskussion* (1998), pp. 181-182.
[714] See the debate in Khaṣṣāf, *Adab al-qāḍī*, sec. 21, this Chapter Two, V.2.a.aa. (1.), see also Mārwardī, *Adab al-qāḍī*, sec. 416, p. 261-262; Schneider, *Das Bild des Richters* (1990), p. 100; Khaṣṣāf, *Adab al-qāḍī*, sec. 21, p. 43. See also Ibn Qudāma, Mughnī, IX, p. 52. all refering to Abū Ḥanīfa.
[715] Khaṣṣāf, *Adab al-qāḍī*, sec. 20, p. 43, Schneider, *Das Bild des Richters* (1990), p. 221.
[716] On Hanafi school preference by Abbasids, see Chapter Four, I.1.b. and Chapter Four III.1.e.
[717] Masud/Peters/Powers, *Dispensing Justice* (2006), p. 10.

For Shāfiʿī, the only case where he obliges the adoption of a legal opinion is when there is a risk of the judge otherwise violating the foundations of the law, *uṣūl al-fiqh*, and when there is the danger of (subjectively) making law. Shāfiʿī fears a form of judicial activism, adjudication beyond authoritative texts and methodology. To prevent this sense of adjudicative legislation, Shāfiʿī not only recommends the soliciting but also obliges the adoption of a legal opinion by the jurisconsult as an extrajudicial authority.

bb. The Facultative vs. Obligatory Nature of Judicial Consultation

With consultation being referenced in the Qur'ān, and precedent of the Prophet and early caliphs seeking consultation, the question is what legal nature the principle of consultation has: is the soliciting of advice recommended or obligatory?
For Khaṣṣāf consultation is a recommendation, his commentator Jaṣṣāṣ also speaks of consultation as a recommenation.[718] Thereby the Ḥanafī position is congruent with the majority opinion of later Muslim scholars. The general depiction in later primary and secondary source material is that the majority of scholars considered consultation a) a recommendation only, and b) that the soliciting judge should not be bound by the result of the consultation: The majority of legal scholars argued in favor of the recommendatory character of consultation since they rejected the idea of conformism (*taqlīd*) of a judge.[719]

Shāfiʿī was also explicit in rejecting the judge to conform, or submit to the opinion of another jurist[720], regardless of the latter's (elevated scholarly) position regarding knowledge and understanding.[721] This is only logical: A valid and sound legal reasoning, once arrived at, should not be given up for another's valid and sound legal reasoning. This does not address the poinnt though that in the very process of the judge arriving to

[718] Khaṣṣāf, *Adab al-qāḍī*, sec. 108, p. 106. Refering to Abū Ḥanīfa (d. 150/ 767) Khaṣṣāf sec. 105, p. 104 " lā ba's…" It does not harm, (or: there is no objection against) that trustworthy persons sit with the judge in the court session (without explicit mentioning of consultation); Khaṣṣāf, *Adab al-qāḍi*, sec. 107, p. 105 speaks of yanbaghī/mandūb.
[719] See Badry, *Die zeitgenössische Diskussion* (1998), p. 182 citing Ibn Abī Dam, p. 64 instead of many. Judge, jurist and traditionalist ʿAbdallah Shubruma (d. 144/ 761) is reported of having said that an erreaneous judgment based on ra'y is more preferable than the judgment based on the consultation with ten scholars, Wakīʿ, *Akhbār al-quḍāt*, III, p. 86. However, Schneider argues that this report is to be seen critically as it might rather reflect the time's debates about ra'y in adjudication and in legal theory, Schneider, *Das Bild des Richters* (1990), p. 111.
[720] Shāfiʿī, *Kitāb al-umm*, VI, p. 219.
[721] See Muẓānī, *Mukhtaṣar*, p. 241 ; Schneider, *Das Bild des Richters* (1990), p. 97.

his result he shall be perceptible and open to all sound legal arguments and reasonings. As Shafiʿī said, this is the role for the jurisconsult: To point out legal aspects that the judge might not have seen.

A later Shāfiʿī writer is even clearer: The Shāfiʿī jurist Māwardī (d. 450/1058) argues in his *adab al-qāḍī* work, based on Shāfiʿī's, that consultation (*mushāwara*) in doubtful cases is obligatory (*ma'mūr bihā)* on the one hand, and otherwise recommended (*mandūb ilayhā*).[722]

Many scholars of the formative period represent different nuances between strongly recommended and quasi-obligatory.[723] A court session is not invalid when there is no consultation. Still, there is strong approval for judges of all levels of knowledge to seek consultation. There is no instance that controls, sanctions or punishes consultation or the lack hereof, and there are no rules as to at what exact instance or time during the litigation process consultation is to be requested. The jurisconsult cannot urge the judge to follow his legal opinion, if the judge himself is not persuaded by the jurisconsult's arguments. Even where consultation is made obligatory in Shāfiʿī's writing, consultation is not imperative in the sense that a judgment arrived to without jurisconsultation were to be considered invalid. All judgments are valid for enforcement, unless they obviously violate text, precedent or consensus.[724] Normatively, the jurisconsults could not do anything to obstruct a judgment from being issued. Consultation is normative but not imperative.

For Shāfiʿī, the nature of consultation switches from recommended to (quasi-)obligatory: Though the persuasive opinion or advice lacked the certainty of implementation, it could amount to more than a recommendation and less than a command that is hard not to follow.[725] Shāfiʿī might have hoped that the "persuasive force" of the need to consult was impossible to overcome.

The normative nature of consultation is relevant as it influences the relationship of authority between judge and jurisconsult: the more obligatory consultation with a

[722] Māwārdī, *Adab al-qāḍī*, I ,sec. 409, p. 255, *idem*., I, sec. 411, p. 260; On the other hand ma'mūr bihā (obligatory) Māwardī, *Adab al-qāḍī*, I, sec. 412, p. 260-261, *idem*., I, sec. 432, p. 268, § 432. Badry, *Die zeitgenössische Diskussion* (1998), p. 95.
[723] Badry, *Die zeitgenössische Diskussion*, p. 96.
[724] See Māwardī, *Adab al-qāḍī*, I, sec. 414 commenting on Shāfiʿī; Shāfiʿī, *Kitāb al-umm*, VI, p. 220. Schneider, *Das Bild des Richters* (1990), p. 100.
[725] Rabe, "Autorität" (1992), p. 383.

jurisconsult is made, the higher the consultant's authority is elevated vis-à-vis the judge. In this sense, the Shāfiʿī position would elevate the jurisconsult's authority in some cases over the judge's though would generally keep the judge's authority intact, refering to his ultimate autonomy.

With the nuances in the categorizations of consultation a new level of normativity is introduced, quasi-obligatory. This shift signals also the dual functions of consultion for Shāfiʿī: The recommendation comes to guide the judge in his deliberations, the order comes out of fear that the judge could act as a legislator.

cc. Indeterminacies in Law Necessitate Consultation

Judicial consultation is an attempt to resolve the doubts that arise from the indeterminacies of text. It reflects the consciousness of Muslim jurists with the "open-textured" nature of law, and the additionally complicated responsibility with the legal nature of a *ius divinum*.[726] Consultation is relational to probability, or uncertainty, in law. In reaction to the consciousness for probability in law, Muslim jurists operated with the concepts of consensus, legal reasoning (*ijtihād*) and consultation.

This uncertainty leads to the consciousness of the jurists that all legal reasoning is of probable nature only, and the more jurists share this probable result, the more it becomes operable. Thus, consultation is closely linked to consensus.[727] Where there is text and consensus, they are obligatory sources of law. Where there is none, legal reasoning, and by extension consultation, are necessary.[728] In matters that are not bound by consensus, legal reasoning (*ijtihād*) is needed to fill the gap of a missing text. This interpretive activity, for its part, shall be accompanied by the consultation with other jurists. Judicial consultation, thus, functions as a gap-filling measure.

Thus, the question of *when* to solicit is strongly related to the gaps, ambiguities and conflicts in law that neccessitate interpretation. Interpretation takes place no matter how

[726] H.L.A. Hart used this term to refer to the indeterminacies that will inevitably arise in general rules, standards, and principles, which, "however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate." Hart, *The Concept of Law* (1994), pp.125-28.

[727] See in this Chapter Two, V.2.b. (Khaṣṣāf sec. 13-16). Also, Schneider, *Das Bild des Richters* (1990), p. 222.

[728] On consensus, legal reasoning and consultation see previously in this Chapter Two, V.2.b.

purportedly clear or doubtful the text. And so at least Khaṣṣāf realizes that there is no need to qualify the reasons for judicial consultation – the jurists of the city shall always be consulted, no obvious or particular difficulty of the case is needed; interpretation always takes place.

As the schools took different stances to deal with textual uncertainty within legal theory, they also differed on consultation. The Ḥanafī school welcomed the judge's individual effort of legal reasoning while judicial consultation was recommended throughout. But it remained precisely this: A recommendation. At no point was the judge coerced to solicit or even adopt a jurisconsult's legal opinion. He was encouraged to adopt the legal opinion of the jurisconsult as his own when he was not qualified to arrive to a legal opinion himself.
Shāfiʿī however, made a stept from consultation as recommendation to consultation as order, if need be. This is parallel to his move to restrict individual effort of legal reasoning to the legal instrument of analogy.

Although the explicit treatments of the concept of probability held by the legal theorists are few and most sketchy, it is clear that the dominant conception of probability was that of "relative frequency (evidence)"[729], ideally building up to consensus. The jurist must reach the opinion through a direct analysis of the authoritative legal sources, and thereby the opinion represents the ruling which was probably decreed by God. If other qualified jurists (*mujtahids)* who reached their opinions through similar, independent means agree on the same point of law, then they will be corroborating each other as well as conclusively demonstrating that thte ruling of that particular case is (relatively) certain.[730] This was a way to operate the law, as Muslim scholars nevertheless realized that the realm of law was probability (*zann*), not certainty. [731] This self-conscious epistemology must have made scholars of all schools both anxious and humble.[732] This is why Khaṣṣāf constantly advises the judge to adjudicate according to what comes "closest to the truth" and what might be best, a mitigated form of juridical scepticism, questioning whether certain knowledge is ever possible.

[729] Zysow, *The Economy of Certainty* (1984), p. 461.
[730] Hallaq, "Inductive Corroboration, Probability and Certainty" (1990), p. 24.
[731] Zysow, *The Economy of Certainty* (1984), p. 460.
[732] Reinhart, "When Women Went to Mosques" (1986), p. 117.

The joint denominator for all Muslim jurists is the legitimacy of disagreement on points of law.[733] This indicates that all (qualified) jurists are correct in their legal reasoning. If there were convincing evidence (*dalīl qā'im*), in the form of a text or consensus, for one correct doctrine, then God would have made the discovery of that doctrine obligatory, and the jurist who failed in his search would be culpable.[734] Such is the situation in theology, where no disagreement is tolerated.[735]

Uncertainty is thus not only inextricably connected to interpretation through *ijtihād*[736] but also to consultation. Uncertainty and consultation are two sides of one and the same coin. Muslim jurists link uncertainty and the necessity of interpretation to consultation. The consciousness of the jurists thereby went beyond the fact that legal hermeneutics always involved the interpretation of binding texts, or that the text carried a meaning that needed concretization through interpretation.[737] The text itself carries meaning but not sufficient for application.[738] To render the text suitable for application, or to apply, to make law, I argue that consultation was considered crucial because of two things:

1) Consultation enlarged the hermeneutical options. The result of this hermeneutic consciousness is a joint, albeit not *per se* egalitarian authority of judge and jurisconsult. Though elaborations on consensus did not effectively produce closure, they motivated joint deliberations between judges and jurisconsults.

2) Consultation was a means of juridical risk distribution between judge and jurisconsult, sharing the burden of interpretation and adjudication in the realm of coercive law.

According to *Shapiro*, sometimes authorities are instrumentally valuable because they save us from having to engage in risky deliberation. [739] *Ijtihād* is such a risky deliberation. For Shāfiʿī, it risks judicial activism, the judge substituting his law for the law of the authoritative texts. For Ḥanafīs, the risk is to make a judgment that is not as close to the truth as it could be through reasoning as a result of consultation. Jaṣṣāṣ in fact points out that to guard against risky decisions, the *qāḍi* must seek the counsel of

[733] The debate is known under the title of "Muʿtazili infallibilism", see Zysow, *The Economy of Certainty* (1984), p. 468.
[734] Māwardī, I, p. 525. (li anna jawāz ikhtilāf al-jamīʿ dalīl ʿala ṣiḥḥat al-jamīʿ); Zysow, *The Economy of Certainty* (1984), p. 468.
[735] Zysow, *The Economy of Certainty* (1984), p. 468.
[736] See Weiss, "Text and Application" (2008), esp. pp. 389-390, discussing Gadamer's hermeneutical approach with its applicability for Islamic law.
[737] Weiss, "Text and Application" (2008), p. 389 with reference to Gadamer.
[738] Weiss, "Text and Application" (2008), p. 390 refering to Gadamer's "hermeneutical problem".
[739] Shapiro, "Authority" (2002), p. 423.

jurists by listening to their opinions on the cases presented to him in the courtroom. Only then should he determine which is the soundest and most suitable opinion for the case in hand.[740] Consultation, therefore, encourages the judge to solicit and possibly follow the pronouncement of the jurisconsult and be reasonably confident that he is making the right selection most of the time.[741] The Ḥanafīs make it clear that joint deliberations are considered better than the solitary deliberation of the judge. By extension, joint deliberations also allow for jointly distributing the juridical risks involved in adjudicating, in making law. This position is accompanied by the hope that joint deliberation lead to the better or even best decision.

Under conditions of uncertainty, "it is normal to seek out experts, to defer to their recommendations" [742], or look for means to share the burden of interpretation. Dealing with uncertainty through consultation reflects a consciousness for the complexities of law. Knowledge and epistemological authority allow a better dealing with uncertainty, jurists were aware that they were not altogether eliminating the phenomenon of uncertainty in law.[743] Consultation does not "transcend law into certainty"[744]. Instead, consultation generates a joint legitimacy for adjudicative results and the joint burden of the illfindings of the law.

The formative period was marked for a push to give stronger contours to sources and methods of law, clarifying but not abandoning free legal reasoning. The more the preceding law was determined and fixed, the less (abusive or not) options there were to create, make law. However, Muslim jurists were conscious that regardless of the scope of precedent, independent legal reasoning, and by extension consultation, could not be done away with.

dd. Reconciling the Authority of the Jurisconsult with the Autonomy of Judge

The autonomy of the judge in the adjudicative decision making process is repeatedly upheld: His legal reasoning enjoys priority over the jurisconsults, the judgment emanates

[740] Jaṣṣāṣ in Khaṣṣāf, *Kitāb Adab al-Qāḍī,* p. 37-39. Hallaq, *Authority* (2001), p. 77.
[741] More generally, Shapiro, "Authority" (2002), p. 423.
[742] Shapiro,"Authority" (2002), p. 423.
[743] Zysow, *The Economy of Certainty* (1984), p. 460.
[744] Vogel, *Islamic Law and Legal System* (2000), p. 144-145.

from the authority of the judge, and Muslim legal scholars reiterate that the adjudicative decision has to be the judge's. And yet, the mere presence of the jurisconsults and the principle of judicial consultation (distinguished by different exceptions for the obligation and adoptability of legal opinions) seems to point towards the idea of the jurisconsults' (trumping) authority as a legitimate concept.

How did the Muslim jurists tackle with, or even refute this "paradox of authority", the conflict between autonomy and authority? The question of if, and if so, how autonomy can be reconciled with authority was seriously addressed by both authors. In fact, they seemed to have followed a philosophy that has brought forward conceptions that make compatible authority with the autonomy of those subject to authority, allowing autonomy to still appeal to various forms of authority.[745]

Autonomy seems to require that one engages in deliberation and comes to an own decisions regarding how one will act. Deference to authority, by contrast, seems to require that one suspends deliberation and does what the authority commands precisely because the authority commands it.[746]

Both Khaṣṣāf and Shāfiʿī address the question how the judge's autonomy could be compatible with the deference of the jurisconsult's authority. They largely see the normative force of the authoritative advice depending on the addressee's free and reflected acceptance of the reason addressed to him – without that deference of authority requiring that one relinquishes deliberative discretion. This is where persuasive authority can affect a change in deliberation without affecting autonomy.[747]

In effect, appealing to authority does not reduce the autonomy of the appealing subject. The appeal to such purposive, persuasive authority is in essence an autonomous strategy.[748] The judge sets the end himself, and the judge continues to steer in that the judge must evaluate whether this strategy will achieve the end he wishes. The judge is not freed from

[745] May, Thomas, *Autonomy, Authority and Moral Responsibility* (1998), pp. 141-147, 151.
[746] Wolff's *In Defence of Anarchism* (1970) was fundamental in drawing attention to and re-initiating a contemporary debate about the difficulty in justifying authority and acknowledging the autonomy of the individual at the same time, also known as "the paradox of authority". *Wolff* concludes that the individual autonomy can never be logically compatible to (legitimate) authority due to the very nature of both concepts. This position of the impossibility of harmonization has been addressed and attempted to overcome by several scholars of legal philosophy, e.g. Raz, *The Authority of the Law* (2009); Shapiro, "Authority", 2002.
[747] Corresponding with the definition of persuasion "Persuasion is a successful intentional effort at influencing another's mental state, behaviour or action through communication in a circumstance in which the persuadee has some measure of freedom", O'Keefe, *Persuasion* (2002), p. 5, and the typology of jurisconsult, Chapter Two, I.
[748] May*, Autonomy, Authority, and Moral Responsibility* (1998), p. 146.

evaluating the content of the reasons for appealing to the extrajudicial authority. It is in this sense that Shāfiʿī explicitly caution that the judge should only follow the advice when he is persuaded by the reasons presented by the jurisconsult. [749]

Muslim jurists were keen to emphasize that the judgment emanates from the judge's authority alone, that his decision remained his alone, even when advised by the jurisconsult. Having said this, the elaborations on extrajudicial authority in adjudication underline that even when the judge adopts an advice as a very weighty reason to judge accordingly, the judge is always warned to not have advice replace his own legal reasoning. Rather than replacing, the advice is simply to affect the judge's legal reasoning. Like this, the jurisconsult is seen as not exercising authority over the judge. He attempts to persuasively affect the judge's reasoning, rather than replace it.
Thus, my reading of both jurists is that the autonomy of the judge is maintained while the authority of the jurisconsult to have his legal opinion solicited and, possibly adopted, is taken into account, when, and only when it is persuasive because it comes closest to the perceived truth or the method considered true. According to the latter opinion of Abū Yūsuf and Shaybānī, the judge, once he has exercised his epistemologically sound efforts of legal reasoning, has to adhere to his opinion. The jurisconsult's *ijtihād* might be sound and valid, yet is no reason for the judge to revise his judgment.

Even where the judge follows the opinion of the jurisconsult, the question of trumping, decisive authority is a question of the better sound reasoning of deriving the law, it is epistemologically grounded authority, not per se one that infringes on the autonomy of the judge: The authority of the better, more substantiated argument that is closer to the truth. *In this situation, for this case* the jurisconsults's authority trumps the judge's authority. It is situative authority that can be decisive in this case, and theoretically, not in others, where, theoretically the jurisconsult's reasoning and authority might not trump. So the jurisconsult's authority is, also, a situative authority, not an institutional one. Islamic jurists knew that they were engaging in an exercise of probabilities[750], which discouraged the establishment of institutional hierarchies of legal personae.
The jurisconsult's authority is dependent on the contents given, not because of the jurisconsult *qua* jurisconsult. The judge does not agree to obey the authority of the

[749] Shāfiʿī, *Kitāb al-umm*, VI, p. 219.
[750] Tomeh, "Persuasion and Authority" (2010), p. 170.

jurisconsult *whatever it may be.* [751] The judge thus does not surrender his own autonomy and determination to the required action of the authority.[752]

Behind the delicate balancing of authority as grounded in epistemologically sound opinions of judge and jurisconsult, the jurists' concern to leave intact the autonomy of the judge in face of the jurisconsult's sound opinion, and the re-occurring advice to consult and adjudicate according to what "corresponds closest to the truth" looms a grand theological-legal theme on whether the judge, or any jurist, can recognize the truth, derive the law accordingly and – in light of this challenge – produce a valid judgment. [753]

All jurists agreed that even legal rules based on probability rather than certainty were a sufficient basis for adjudication.[754] What followed was the theological-legal maxim that developed in 8th century Iraq according to which "all scholars who exert their independent legal reasoning find the right solution" (*kull mujtahid musīb*).[755] The judge could hope to meet God's will, but he could not be certain.[756] All diverging opinions that were based on sound methods of *ijtihād* are, equally valid. The theological extension of this position was that when the judge, if he cannot err in his legal interpretation, he cannot sin by it either. For Abū Ḥanīfa, though, some *ijtihād* by extrajudicial authorities can still be more persuasive in being closer to the truth and should be followed by the judge. If and when the judge finds the jurisconsult's opinion more convincing, is a matter that solely the judge was to decide. This way, the decision remains within the sphere of the judge to acknowledge and decide what comes closest to the probable truth – this, and not the superior rank of a more knowledgeable jurist decides on adjudication.

[751] The opposite case would be the judge agreeing to abide by the authority and legal opinion of the jurisconsult *whatever it may be.* This is a phenomenon H.L.A. Hart has termed 'a content independent reason', i.e. a reason for action regardless of what is called for. Hart, *Essays on Bentham* (1982), p. 254. It would lead to the surrendering of automony to the benefit of authority.
[752] See similarly, May, *Autonomy, Authority, and Moral Responsibility* (1998), p. 129.
[753] Equally important but not part of this work: what if he factually cannot see the truth and still makes law with coercive effects for the parties involved? On the legal and ethical validity of the judgment for the litigants, see Johansen, "Truth and Validity of the Cadi's Judgment" (1997), p. 9-20.
[754] Johansen, "Truth and Validity of the the Cadi's Judgment" (1997), p.7.
[755] Van Ess, *Theologie und Gesellschaft* (1992), II, p.161-165; Johansen,"Truth and Validity of a Cadi's Judgment" (1997), p. 7.
[756] Johansen, "Truth and Validitiy of the the Cadi's Judgment" (1997), p.8.

And in this way the jurisconsult surely has no coercive authority over the judge: He cannot make the judge change or overturn his judgment, once taken[757], but he can persuade him within the decision-making process. This way, the decision would still entirely remain within the judge's autonomy, and yet the persuasive authority of the jurisconsult would have an effect on adjudication. So taking the decison is the judge's, but preparing the decision is the jurisconsult's.

ee. The Jurisconsult as Guide or Constraint to the Judge

The discursive development of legal reasoning (ijtihād) as a legal method within the Islamic theory of law is significant in determining the role of the jurisconsult as a guide or constraint to the judge – or both.[758] It is key to understanding the challenge met of judgment under uncertainty.

The school comparison reveals how the use of individual reasoning in legal theory impacts the authority of judge and jurisconsult in the adjudicatory process.
Khaṣṣāf and Shāfiʿī are united in their position that *ijtihād* was a prerogative of the judge. Though all qualified jurists could exercise *ijtihād* in their interpretation of the law, it was the judge's *ijtihād* that enjoyed priority in adjudication. Autonomy of the judge was, in principle, a joint stance of both jurists. Thus, a judgment issued without no prior judicial consultation was nevertheless regarded valid, and was no reason for revision or annulment.[759]

The central question is whether the jurisconsult acted as a guide or constraint to the judge's individual effort of legal reasoning (*ijtihād*). Was independent judicial reasoning of the judge meant to be enhanced or restricted through judicial consultation? Was the strong privilege of the judge to exercise legal reasoning in adjudication augmented or curbed by the urge to solicit extrajudicial consultation (*ijtihād* vs. *mushāwara*)?

[757] Māwardī later is to explicitly say that objections of the jurisconsults against a judgment are not permitted, Māwardī, *Adab al-qāḍī*, I, sec. 415, p. 261; Schneider, *Das Bild des Richters* (1990), p. 100.
[758] The categorization of "guide or constraint" is taken from Duncan Kennedy questioning the rule of law as guide or constraint to the contemporary US-American judge. He posits that the judge is free and bound at the same time, Kennedy, "Judicial Ideology" (1996), p. 816 in particular; Kennedy, "Freedom and Constraint in Adjudication" (1986).
[759] Judicial review was possible (only) under the confined reasons that the authoritative texts were violated, see Shafiʿī, *Kitāb al-umm*, VI, p. 220. More generally, Powers, "On Judicial Review in Islamic Law" (1992).

This question is central because it accords a role to the jurisconsult that defines his authority within the system of adjudication in general, and towards the judge in particular.

(1.) The Jurisconsult as a Guide to the Judge's Legal Reasoning

Extrajudicial authority becomes decisive when the judge must decide in cases where there is disagreement over the textual basis for deriving a rule. Whenever scriptural authority was considered to have come to its limits, the judge can get guidance through the jurisconsult's opinion. Also, there is the possibility of new cases, in which case the judge needs to decide on the basis of texts and the help of consensus, analogy, legal reasoning and discretionary opinion as well as the advice of the legal scholars to try to come closer to the solution of the legal case ("closest to the truth"). Additionally, there is the possibility that the Ḥanafī judge was not being qualified enough to excert legal reasoning and was then encouraged to turn to the jurisconsult and adopt his legal opinion as his own.

The Ḥanafī school is particularly interesting because they took a generally welcoming stance on individual effort of legal reasoning. Ḥanafī jurists granted a wider role to legal the judge's legal reasoning in adjudication and by consequence saw less of a necessity to control the judge's reasoning by the jurisconsult – extralegal opinions in adjudication were recommended throughout, yet not to control the judge. Instead, consultation was seen as a means of joint decision-making, with the judge and the jurisconsult jointly establishing a consensus that serves as a legitimate basis for the judgment. The judge should not go against this joint consensus in his judgment.[760] Judge and jurisconsult practically overcome probablity by establishing a joint consensus in this individual adjudicative case.

In Ḥanafī legal thought, the jurisconsult was considered to act as guide to the judge. Though judicial consultation was highly stressed, it was not made obligatory on the judge to adopt the jurisconsult's opinion and discard his own opinion. An exception is made for the non-qualified judge, who lacking his own opinion, should accept and follow

[760] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 17, p. 42, Jaṣṣāṣ, *Kitāb aḥkām al-Qur'ān*, II, p. 49-50. Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 78.

the jurisconsult. In this, Khaṣṣāf follows a general position of the Ḥanafī school, namely to take a friendly position on individual effort of legal reasoning.

For the Ḥanafīs the turn to *ijtihād* had not seemed to threaten making judicial reasoning subjective. Either way, judges could either master *ijtihād* or would solicit a jurisconsult and follow his advice. In fact, even when judges mastered *ijtihād*, they had the chance and were recommended to get re-assurance from a jurisconsult. The jurisconsult should act as guide, and *ijtihād* was nothing to be feared of, if thought of as a joint deliberation.

(2.) The Jurisconsult as a Constraint to the Judge's Legal Reasoning

The relatively broad principle of legal reasoning (*ijtihād)* was gradually narrowed down, so that legal reasoning should be applied in the form of analogy. This was a development that was, if not initiated[761], then outlined by the work of Shafiʿī. Where Khaṣṣāf's speaks of legal reasoning (*ijtihād*) or discretionary opinion (*ra'y)*, Shāfiʿī later prefers analogy – a development that corresponds to the later firmly acknowledged order of norms Qur'ān, Sunna, consensus and analogy.

While Khaṣṣāf allows a judge who does not have an opinion to adopt the opinion of a legal scholar, this deference to another authority, or legal conformism, is criticized by Shāfiʿī. According to Shāfiʿī, the judge was not permitted to simply rely on the opinion of others. Yet, since for Shāfiʿī the textual basis of any new ruling was crucial, and the jurisconsult could aid the judge in demonstrating the textual bindingness as entailed in these sources.[762] Thereby controlling the judge is possible, and maybe necessary, by urging him to adopt the jurisconsult's opinion when legislation substituting authoritative sources is feared.

Compared to the Ḥanafi school, Shāfiʿī took a constrained take on individual effort of legal reasoning, fearing that it could lead to judicial legislation.[763] In fact, Shāfiʿī's

[761] Hallaq, "Was Shāfiʿī the Master-Architect" (1993).
[762] On Shāfiʿī's explicit aim to have the jurisconsult aid the judge in discerning the binding sources of the law, see this Chapter Two, V.2. a bb., and Chapter Two, V.2.b.bb.
[763] Shāfiʿī in principle did value the idea of *ijtihād* as based on the Prophetic ḥadīth: "If a judge (*ḥakīm*) judges and practices ijtihād, and attains the truth, he has two rewards. If he practices ijtihād and is in error, then he has one reward". (see above) Shāfiʿī, *al- Risāla*, p. 494. Ḥadīth in Al-Bukharī, IV, 255(Iʿtṣām, bāb 13, 20, 21); Muslim (Aqḍiya 13); Abū Dawūd (Aqḍīya 3574); al-Tirmidhī (Aḥkām 1326), al-Nasā'ī II, 223 (Quḍāh); Ibn Māja (Aḥkām 2314). Tillier, *Les Cadis* (2009), p. 624.

critique of Ḥanafī law was that it was 'activist', that their understanding of *ijtihād* was too unconfined, and that the judge's *ijtihād* should be monitored by the jurisconsult. Shāfiʿī jurists wished to monitor the judge by widenening the scope for the jurisconsult's role in adjudication. The jurisconsult should thus act both as guide and as constraint to the judge, guiding the judge through the textual basis for possible new rules, and also constraining him so that he does not insert subjective elements in adjudication.

Shāfiʿī is willing to curtail judicial discretion, i.e. judicial autonomy, in deference to legislative supremacy presented in the text, as presented by the jurisconsult. It is of course a legal construct to speak of such deference given text's indeterminacy; the legal process always involves a measure of interpretation, whether involving "the law" as embodied in texts or the facts to which those laws are supposed to apply. Insistence on judicial deference then is not about any actual eradicating of discretion and whether interpretation takes place no matter how supposedly clear or doubtful the text. Instead, it is about which interpretive philosophies Muslim jurists rely on in their claims of textual fidelity and whether their arguments resonate in their broader legal and societal cultures.

Shāfiʿī is more inclined to have the judge not only solicit but also adopt the legal opinion of a jurisconsult. He thereby admits more control on the judge by the jurisconsult. This might not be surprising: Jurists concerned with the *lege artis* application of the law, and the making of judicial law as well as the integrity of the *qāḍī* office had no unanimously accepted, effective, legal means of control at their disposal. The *qāḍiship* was conceived as a high-ranking office that had no other office, apart from the caliphate, above it.[764]

The judge's *ijtihād* thus was confined through the recommendation, obligation[765] to consult the jurisconsult. Consultation normatively served to restrict the autonomous application of law by the judge.[766] Thus, while in part the judge could adjudicate

[764] The mazalim jurisdiction as well as successor review were very confined possibilities to do so. Rebstock, "A Qāḍī's Error" (1999), p. 16; Powers, "Judicial Review", p. 317. On mazālim courts (petition courts) as a way to control adjudication, Rebstock, "A Qāḍī's Error" (1999), p. 14.
[765] Schneider considers it an obligation, not a recommendation, see Schneider, *Das Bild des Richters* (1990), p. 193.
[766] Schneider, *Das Bild des Richters* (1990), p. 200-201. The argument of the *muftī* acting as a restriction on *qāḍīi* judgments was also made by Gibb/Bowen, *Islamic Society and the West*, (1957), II p. 65, however, for the 18th century.

according to his *ijtihād*, he was in part also obliged to submit to legal conformism (*taqlīd*) by adopting other scholars' legal opinions to avoid judicial legislation.
By Shāfiʿī constraining and guiding the judge, the judge is yielding to authoritative advice when his "epistemic state is highly indeterminate".[767]

For the relationship of jurisconsult and judge this meant that the more legal reasoning was narrowed down, the more influence was given to the jurisconsult as a monitoring, controlling instance. The requirement that the judge must resort to the jurisconsult for legal advice underscores the fact that it is the jurisconsult, not the judge, who is the ultimate expert on law.[768] This conclusion is supported by the fact that although both, judge and jurisconsult are capable and allowed to perform *ijtihād*, the final goal of the methodology of theory of law (*uṣūl al-fiqh*), the jurisconsult's role to monitor this process puts him on a superior level evaluating what is considered the appropriate law. In the post-formative period, it was the *muftī* only, not the *qāḍī*, who was equated with the one to exert *ijtihād* (*mujtahid,* i.e. qualified to exert legal reasoning). Indeed, in the discourse of *uṣūl al-fiqh*, the terms *mujtahid* and *muftī* were used synonymously.[769] It seems that Shāfiʿī's thoughts were a prelude to this development.

The way extrajudicial authority was handled reveals the admission or fear of "free", non-textual legal reasoning. It reveals the understanding of and dealing with subjective elements, personal discretion, in adjudication. It is a conscious handling of uncertainty in law, giving it space in legal theory, juristic reasoning and adjudication. Requesting legal advice is a way of dealing with uncertainty in law, and of guiding and constraining the judge in the face of legal uncertainty.

(3.) The Jurisconsult's Role in Adjudication

The jurisconsults were integrated into adjudication for a variety of reasons:
Where the judge needed to make use of individual effort of legal reasoning, Muslim legal doctrine foresaw a role for the jurisconsult.

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[767] Shapiro, "Authority" (2001), p. 423.
[768] Hallaq, *Authority* (2001), p. 191.
[769] Hallaq, "Iftā' and Ijtihād in Sunni Legal Theory" (1996), p. 34 referring to the writings of 19th century scholar Ibn ʿAbidin. See the synonomous use of *muṛti* and *mujtahid* in the typology of judge and jurisconsult, Chapter Two. I.

One, Shafiʿī in particular seemed to be keen on reducing the subjective element judges bring into adjudication. Judicial law-making, while inherent in adjudication through probability, should be restricted to the case of analogy, and, monitored by the jurisconsult. In general, the people of knowledge (*ahl al-ʿilm*), as the extrajudicial authorities are also called, exercise control over much of the knowledge engendered by the revelatory texts.[770] This role is also granted to them within adjudication- watching and monitoring the judicial law-interpreting processes. Monitoring the judicial processes was thus part of islamicizing the law. As part of Shāfiʿī's efforts to Islamize the law, he has spoken out against *ijtihād* and advocated for analogy (*qiyās*) as legal principle.

Two, both Khāṣṣāf and Shāfiʿī seemed to have had another role for the jurisconsult in mind, namely one aimed at supporting and enlarging the knowledge of the judge. Their role too was possibly to standardize and Islamicize the still nascent system of Islamic law whose application in the vast Abbasid Empire varied immensely, a great concern to some, as laid down in Ibn al-Muqaffa''s treatise.[771] This task was particularly important when textual difficulties arose and legal reasoning and legal interpretation were needed where there was no applicable text[772] – a challenge that is likely to have emerged on a regular basis as an accompanying phenomenon of an evolving law. As specialists of law, they are uniquely qualified to deal with the boundaries and lacunae of texts that raise epistemological concerns.[773] In Shāfiʿis epistemology, scholars of law, collectively, are indispensable to the legal system. Or as *Lowry* puts it, "[s]cholars not only have the unique ability to deal with hard questions, but their presence is absolutely vital for the functioning of the system as a whole"[774] – for the judicial system as a whole, one may qualify.

I. Schneider argues that jurisconsults are included in the system to overcome the ignorance of judges, be they non-jurists or simply bad jurists.[775] Jurisconsults are there to serve as a source of information and as an aid in the adjudicative descion-making

[770] Lowry, *Early Islamic Legal Theory* (2007), p. 280.
[771] See Chapter Four, III. for caliphal secretary Ibn al-Muqaffa''s position on the state of the law.
[772] Lowry, *Early Islamic Legal Theory* (2007), p. 278, with respect to the people of (legal) knowledge (*ahl al-ʿilm)* as analyzed in Shāfiʿī's *Risāla*.
[773] Lowry, *Early Islamic Legal Theory* (2007), p. 279.
[774] Lowry, *Early Islamic Legal Theory* (2007), p. 279.
[775] Schneider, *Das Bild des Richters* (1990), p.108.

process.[776] While it is correct that lay-judges were found in the Abbasid judiciary, they seem to have been relatively few. The overwhelming majority enjoyed a legal education.[777] While for *I. Schneider*, judicial consultation is largely an answer to ignorance in the adjudicative system. I would argue that the role of extrajudicial authority in consultation much rather reflects an early consciousness of uncertainty in law, and the complexities in and of law. Judges needed not to be ignorant or bad jurists to still face challenges in interpreting, respectively having to make law. Rather, precisely because they either realized that legal possibilites were vast given the legal realm of probability (*ẓann*), or uncertainty, they either, assertively speaking, wanted to aid the judge in the judicial process of speaking law or, restrictively speaking, monitor the judicial verdict. This take is also reflected in the theological debate about truth in adjudication.[778] All this reflects a heightened sensitivity of the formative period for the burden of interpreting, and inter-alia making law.

[776] Schneider, *Das Bild des Richters* (1990), p. 107-111 on consultation in adjudication, in particular p.108-109.
[777] See this Chapter Two, V.1.a. on the legal educational background of the judges, as well as Chapter Four, I.2.b.on their training in the nascent schools of law.
[778] For the debate under the title *kull mujtahid musib* ("All scholars who exert their independent legal reasoning find the right solution", see van Ess, *Theologie und Gesellschaft* (1992), II, p. 161, 161-165; ibid., (1993) V, p. 117-119.

VII. Conclusion: Uncertainty in Law Creates Authorities

The normative context of advice brought to light that sociolegal questions of who makes the law cannot be divorced from legal theoretical questions of the authoritative status of law. In this sense, uncertainty produces authorities in law.
Judicial consultation thus can be seen as both a consultative as well as a participative activity.[779] It is consultative in the sense of having to exercise legal reasoning and it is participative in the sense of contributing to a consensus. This underlines one of the key findings of this chapter, namely that consultation is firmly linked to legal theory. Or, differently put, that the authorities in law are conditioned to the authority of the Law.

Muslim jurists debated how to overcome uncertainty, and what the scope of legal reasoning beyond the authority of the text can possibly be. For legal philosopher *S. Shapiro*, "under conditions of uncertainty, it is normal to seek out experts and defer to their recommendations"[780]- even when the one seeking out is an expert him or herself. When the judge faces cases of uncertainty, and the advice emanates from a highly reliable source, the judge of his own accord and by deliberating meticulously can commit himself to accept as true the recommendation of the expert.[781] Muslim jurists saw consultation as a professional necessity.[782]

Similar to other scholars critical of the dogma of the binding force of law , Muslim legal jurists never thought that deduction would be the exclusive tool of legal interpretation to overcome uncertainty. They experienced gaps, conflicts and ambiguities throughout the whole of the evolving legal system, and *ijtihād* became a necessary though variously conceptionalized part of routine legal work in the formative period of Islamic law.

[779] Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998), p. 174, speaking of political participation though.
[780] Shapiro, "Authority" (2002), p. 423.
[781] Shapiro, "Authority" (2002), p. 423.
[782] See also the Consultative Council of European Judges considers the quality of adjudication to be based on efficiency, legitimacy and ethics. As one element of ethics, the exchange of ideas is considered crucial by the working group of the Consultative Council of European Judges (CCJE) in 2008. See Alt, "Qualität der Rechtsprechung", Betrifft Justiz 2009, 28ff, quoted by Eckertz-Höfer, "Vom guten Richter" (2009), p. 740.

Without any form of legal reasoning, Muslim jurists knew that otherwise they would not be able to interpret the law.[783]

Muslim jurists realized that law, when ungoverned by revelation and auxiliary text, had its basis in probability. Uncertainty was accompanied by interpretation of revelation by individuals, which could well lead to different results. Thus, to derive the law from sources that were probable (as the Arab technical term *ẓann* would have it), or indeterminate or uncertain (the Anglo-American terminology), the jurisconsult was foreseen to act as guide or as control to the judge, depending on the school of law. Thus, the authorities in law were related to the authority of law (and vice-versa). The role and the authority of the jurisconsult was referred back and tied to the role of legal reasoning beyond text in legal theory. While following the advice and authority of a jurisconsult was not a magic cure to indeterminacy, both guidance and control meant that the burden of judicial risk-taking (and the pending punishment in the Hereafter) was shared between judge and jurisconsult, whether jointly (according to the Ḥanafī understanding) or in a more asymmetrical way (according to Shāfiʿī).

This chapter showed how the jurists of the schools of law have given different normative answers on when and why the judge is to request a legal opinion. The schools took a different stance on whether a jurisconsult's opinion was to be considered a recommendation that the judge was free to adopt (the jurisconsult acting as a guide) or whether the jurisconsult's advice was to minimize subjective elements in adjudication (the jurisconsult acting as a constraint to the judge). While the Ḥanafī recommendation to consult was articulated to guide the judge, the Shāfiʿī's shift from an initial recommendation to an order also signals a shift adding control to the jurisconsult as a guide.
As in the normative elaborations there was no imperative, no coercive element at any point, the judge was left to autonomously decide for himself whether he considered the jurisconsult's reasons and authority to be persuasive enough to be followed.

The lack of certainty in law and the fact that uncertainty is part and parcel of any legal system, opens the gate for the dangers often dismissively called a "Kadi-Justiz", i.e. an

[783] On legal realist H. Wechsler and his understanding that without policy, jurists would not be able to interpret the law, Kennedy *The Canon* (2006), p. 314.

adjudication leading to arbitrary results.[784] For example, U.S. Supreme Court Justice Felix Frankfurter, in his dissent in *Terminiello v. Chicago,* addressed the limits on the Supreme Court's extent of inquiry and stated: "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi sitting under a tree dispensing justice according to considerations of individual expediency."[785] The image is meant to suggest that, in the Islamic context, the law is arrived at in an unprincipled manner that reflects the whim of the *qāḍī* more than the demands of a rationally cohesive legal system. This depiction entered not only US-understandings of Islamic adjudication. Similarly, the President of the German Federal Administrative Court stated that because there is no certainty in law and because certainty cannot be attained, judges are not allowed to resort to arbitrariness. "[Uncertainty] allows no Kadi-Justice, allows no adjudication that leads to a random and arbiterary result.[786]

Much of this blameworthiness may be laid upon *Max Weber* who wrote that "Kadi-justice knows no rational 'rules of decision' and therefore no accountability.[787] *J. Makdisi* describes the resulting image of Islamic judiciary, diplomatically as "truly mistaken".[788] *F. Ziadeh*, scholar of Islamic law and editor of Khaṣṣāf's *Adab al-qāḍī* work, reproaches justice Frankfurter that if he had read Khaṣṣāf instead of Weber, he would not have "fallen into this error."[789]

Weber's remarks on "Kadi-Justiz" were made at a time of greater confidence in a process of judicial law-making and judicial law-applying, or differently put, at times that did not

[784] President of the German Federal Administrative Court Eckertz-Höfer, "Vom guten Richter" (2009), p. 734. US-American Justice Frankfurter in *Terminiello v. Chicago*, 337 U.S. 1, at 11; 69 S.Ct. 894, 899 (1949).

[785] In his dissenting opinion, Justice Frankfurter in the case Terminiello v. Chicago attached the preference of the majority to find a federal claimhad been pleaded in the lower state courts, *Terminiello v. Chicago*, 337 U.S. 1, at 11; 69 S.Ct. 894, 899 (1949). Similarly, eminent US-American legal scholar Pound dimissively said:
„The oriental cadi administrating justice at the city gate by the light of nature tempered by the state of his digestion." Pound, "Decadence" (1905), p. 21.

[786] Eckertz-Höfer, "Vom guten Richter" (2009), p. 734. "Diese fehlende und nicht herstellbare Determiniertheit erlaubt den Richtern indes keine Beliebigkeit. Sie erlaubt keine Kadi-Justiz, keine Rechtsprechung auf ein beliebiges, gewillkürtes Ergebnis hin." She then refers to the German Görgülü case as an example of *Kadi-Justiz*, of judges taking an evidently subjective, here racist, stance. Regrettably, *Kadi-Justiz* thus has become a generic term, and has migrated to describe law entirely divorced from text. The case in point went from the German lower family court to the European Court of Human Rights (EGMR No.74969/01, Urt. v. 26.2.2004, NJW 2004, 3397) and back to the German Federal Constitutional Court (BVerfGE 111, 307).

[787] Weber, *Wirtschaft und Gesellschaft* (1980), p. 477.

[788] Makdisi, "Legal Logic and Equity in Islamic Law" (1985), pp. 63-5, here at p. 64.

[789] Ziadeh, "Integrity" (1990), p. 80.

see the consciousness for uncertainty in law in the common and civil law world.[790] But even today, the recourse to "Kadi-Justice" obscures the fact that Muslim jurists were much more conscious about the uncertainty of law, as would believe in many circles of the academy. A look into Khaṣṣāf's and Shāfiʿī's work would have illustrated how conscious judges were about the complexities of the law and the juridical challenges in the face of gaps, ambiguities and conflicts of the law.

[790] Glenn, *Legal Traditions of the World* (2004), p. 187.

Chapter Three: Manifestations and Culminations of Authorities: Judges and Jurisconsults in Law-Making

Law as a text and method *alone* cannot tell us how a judge will decide a case.[791] Legal scholars agree that there can be multiple equally valid solutions because of law's indeterminacy in many cases.[792]

Other factors must be examined to explain why the judiciary actually decided as it did. Legal Realists therefore call for a descriptive theory of adjudication, a theory of what it is that causes courts to decide as they do.[793]

This is especially obvious in the relation between judge and jurisconsult—the non-formalized net of authority between them cannot be determined solely by reference to normative rules and wide or restrictive approaches to legal theory in forming such rules, despite the reflections of reality they surely contain as explained in Chapter Two.[794] Similar to US-legal realists, Islamic studies scholar *Sherman Jackson* states that "it is not at all the actual substance of the interpretation that gains its acceptance but rather something additional that comes to it from without."[795] This study will demonstrate how the authority of legal personae as decisive for opting for the one or the other final interpretation in adjudication. Thus, I will highlight additional, relational and situative material to contextualize and complement the normative projections of juristic scholarship as laid down in the previous chapter.

Therefore, it is necessary to substantiate the normative with the historical, empirical examples, actual cases, letters of correspondence, biographical information, in short: the material documented in chronicles, evidencing "judicial consultation in action", and thereby the creation of the authority of legal personae. How did consultation (*mushāwara*) work in practice? Was there a seat reserved for a jurisconsult or a panel of

[791] Leiter, "American Legal Realism" (2005), p. 54.
[792] On Authority and Uncertainty in German and US-American legal scholarship see Chapter One, I. 2.d. More specifically, on the role of the jurisconsult because of uncertainty in law see specifically Chapter Two, V.2.
[793] Leiter, "American Legal Realism" (2005), p. 57, idem., "Rethinking Legal Realism" (1997), p. 275-279
[794] Schneider, *Das Bild des Richters* (1990), p. 144; Masud/Peters/Powers, *Dispensing Justice* (2006), p. 16-17.
[795] Jackson, *Islamic Law and the State* (1996), p. xxv. Jackson is largely referring to the authority of the state as a factor that needs to be knitted into the examination of how law comes about, even into a legal system like the Islamic legal system that largely developed without the state's involvement but through the jurists' private engagement.

jurisconsults present during the litigation process? Did the judge interrupt trial during difficult cases and turn to the jurisconsults? Did the jurisconsults affect the choice of judges?

The historical material is provided particularly by the only two judicial chronicles that centrally cover the formative period of Islamic law under the Abbasids, Wakīʿ's (d. 306/ 918) "Report of Judges" (*Akhbār al-quḍāt*) and al-Kindī's (d. 350/ 961) "Governors and Judges of Egypt" (*Wulāt wa quḍāt miṣr*), corroborated and complemented by biographical dictionaries (*ṭabaqāt*). The judicial chronicles, read together with the biographical dictionaries, encapsulate the relationship of judge and jurisconsult in judicial consultation as it affects adjudication – from the organization of adjudication to the final text production of judgments. Of course, as always, caution is advised when dealing with sources that are not contemporaneous with the events that they describe. While the cases presented in the chronicles involved events from the early Abbasid period, even the earliest available reports of them were written about one hundred years later, and they do not claim to be transcripts of actual court proceedings. Rather than taking them as literal descriptions of what actually happened then, we must read them as documents that reflect the ideas of later generations of scholars came to associate with adjudication, the judiciary and the role of the jurisconsults.

Documented cases of judicial consultation between judge and jurisconsult are not as numerous as one would hope. Two conclusions of the scarcity are possible: either judicial consultation was an arrangement considered too common to be documented in each and every case, or consultation was a non-quotidian legal device, mentioned every time it came to the knowledge of the chroniclers. It is difficult to assess with certainty which was more likely. With regard to the normative advice literature in *adab al-qāḍī* (Etiquette of the Judge) as discussed in Chapter Two, we know that the Ḥanafī school recommended judicial consultation without a particular difficulty of the case required, but rather that the judge should unconditionally consult with the jurisconsults of his city or region. The Shāfiʿī teaching abided by the principle that judicial consultation should be applied whenever authoritative sources, consensus and analogy could not offer an obvious answer to the case, and whenever there was a risk of judicial legislation or judicial activism, violating or substituting authoritative sources.[796] Normative writings on judicial consultation therefore suggest that consultation occurred on a regular level since

[796] On judicial activism as can be read in Shāfiʿī's work, see Chapter Two, V.2.b.bb.(2.).

there was an early legal consciousness that authoritative sources, consensus, and analogy were essential but not sufficient to cover all aspects of Islamic legal life, generating dispute over legal discretion in interpreting and adjudication the law. Moreover, jurisconsults existed in every major city and offered their knowledge to the members of the Muslim community from early on.[797]

The limitations of the source material also forbid a systematic comparison between theory (the normative) and practice (the empirical). Not only are departures from the norm likely in any legal system—although frequency and degree vary as a function of the strength of the rule of law. More importantly, the fractional information available leaves us with pieces of a mosaic insufficient to draw conclusions on the overall normative-empirical relation. Instead, I jointly use the sources on the empirical encounters and the normative writings as complementary information, attempting to reconstruct what judicial consultation in action may have looked like, developing a multi-layered picture of adjudicative authority and judicial consultation.

In the course of this reconstruction, I examine how coercive, persuasive, and quasi-coercive aspects of authority in adjudication played out in the non-hierarchical social relations between these legal personae. As explained above in Chapter One, the *coercive authority* of a judge can be assessed through the enforceability of a judge's decisions, particularly his judgments as a means to terminate a dispute and to restore justice. The *non-coercive authority* of the jurisconsult can come in many shades, ranging from persuasive to quasi-coercive. Persuasion is more difficult to establish, given that in some instances it is not documented whether the jurisconsults' advice was realized or not, or in what concrete way it found entrance into the judge's deliberations. What is considered persuasive rests with the questioner or the advised, the judge. For any given opinion, there are no clearly agreed standards of what could be considered persuasive to a judge.[798] As the persuasive opinion or advice by its very nature lacks the certainty of implementation, persuasive opinion "could amount to more than a recommendation and less than a command that is hard not to follow".[799] This subtlety of persuasive authority makes it so challenging to pin down. As it turns out, the jurisconsult is not entirely left to the devices of persuasion, which by definition do not always wield success with the addressee. Turning to a third person with coercive powers over the judge, such as the

[797] See Chapter Four, III. on the professionalization of the scholars.
[798] Duncan Kennedy speaks of no standardess for "convincingness", *Critique of Adjudication* (1997), p. 90.
[799] Rabe, "Autorität" (1992), p. 383.

caliph, provides the jurisconsult with quasi-coercive powers to achieve his ends. This is a type of authority generally neglected and so far not explicitly and sufficiently brought into play to explain a facet of the negotiation of authority between judge and jurisconsult. Interestingly, the sources also describe an event where the judge turns to a third authority to silence the jurisconsult, demonstrating that his coercive authority does not extend thus far.

The authority of personae encompasses three components that prove relevant in this work. Firstly, in examining the documented instances of interaction between judge and jurisconsult, we need to bear in mind that authority can be not only situational, building up dramatically and then losing momentum, but that it can also have effects beyond the immediate situation (*situationsübergreifend*) in longer-term relations of authority (*Autoritätsverhältnisse*).[800] Single events can be seen in a continual or discontinual series of situations of interactions. Even when there is no direct interaction, the mere existence of this relationship can be decisive for the behavior. For example, the mere presence of a *muftī* can be decisive, it needs no actual *fatwā* to affect adjudication by a jurisconsult. More concretely, this study focuses on (real or imagined) threats or promises made by the jurisconsult to the judge and how they can signify a relationship of authority.[801] Thus, extrajudicial authority can function without being operated through a *fatwā* but knows many ways of operating. As authority tends to hold for longer stretches of time, I assess the series of encounters beyond the situation and to attempt to assess the relationship of *authorities in law* as it affects the *authority of the law*, the way law is being accepted and acknowledged by its recipients. One and the same judge could face jurisconsults differently with diverging results, depending on changing situations in his geographical jurisdiction.

Second, authority is a complex relationship that is often accompanied by further relationships such as cooperation, cooptation, confrontation, or else. Authority is thus embedded in a broader set of socio-legal orderings. Third, a relationship of authority can be symmetrical (and complementary) or asymmetrical (and confrontational). It is

[800] Bahrdt, *Schlüsselbegriffe der Soziologie* (2003), p. 162: "Autorität in ihrer Dauerhaftigkeit sozialer Beziehungen, i.e. Autoritätsverhältnisse."
[801] On relationships of authority based on real or imagined threats and promises see Hale, "Coercion" (2006), pp. 96-97, see also Kennedy, *The Canon* (2006), p. 88.

asymmetrical when the structural influence of one party is higher on the action of the other party, than the other way around.[802]

The first part of this chapter sets out situations of negotiation of authority in a typology built onto a primarily chronological account. The second part of this chapter then explores these cases, highlighting personal, temporal, spatial aspects of authority as well as authority through modalities, themes and arguments by asking the following questions:

1) Who encounters whom: how does the authority of the single judge encounter the authority of the jurisconsult(s), especially when the jurisconsults act as a collective authority. What is the role of the caliph, and how does the persuasive authority of the jurisconsults on the caliph create a quasi-coercive authority on the judge?
2) When, at which moments of judicial law-making does judicial consultation occur and how does each temporary phase affect adjudication?
3) How does judicial consultation occur, i.e. is consultation initiated by the judge or imposed by the jurisconsult; does it occur with, without or against the will of the judge?
4) Where does judicial consultation take place, in the centre or the province of the Empire, serving different purposes?
5) What is judicial consultation thematically about, i.e. what are the legal themes involved over which the question of authority arises?
6) *With which arguments* are hierarchies of authority sought to be realized, such as school of law or fear of changing socio-economic patterns?

The encounters of authorities show how the authority of law was created – through judge and jurisconsult negotiating their interpretations of legal rules.

I. Creating Authority: A Casuistry of Judicial Consultations in Law-Making

As set out in Chapter Two, normative writings on the relationship between judge and jurisconsult stress the principle of judicial consultation. The judge is to voluntarily solicit counsel from the jurisconsult when he is to adjudicate, and this advice can come in form

[802] Bahrdt, *Schlüsselbegriffe der Soziologie* (2003), p. 162.

of a legal opinion (*fatwā*) from the jurisconsult (*muftī*). But, as explained in Chapter One, consultation is understood here not only in the technical sense of soliciting a legal opinion from a jurisconsult in matters of adjudication. Consultation can aim at influencing who should become judge to who should be removed from the judiciary, as well as voluntarily and involuntary incorporations of legal opinions into adjudication, and even unsolicited "advice" without or against the will of the judge that serves to challenge a judge's decision

1. Examining Judges' Willingness for Consultation

Historical chronicles allow us to test whether and how the normative requirement to seek consultation was realized. In fact, even before judges took over adjudication, their willingness to reach out to the jurisconsults were tested, and taken as decisive criterion for appointment, as the following cases show.

a. Reasons for Seeking Advice

Some judges explicitly say why they seek advice, as the following examples show, all interestingly in conversation with political authorities who request to know the judge's procedure of adjudicating.

aa. The Examination of Judicial Candidate Mis-hir by the Chief Justice

Before judges could be appointed by ruling authorities, their willingness to consult was considered a well-regarded criterion, if not even informal precondition.[803] The following is an examination of judicial candidate ʿAbd Al-Raḥmān b. Mis-hir by chief justice (*qāḍī al-quḍāt*) Abū Yūsuf (d. 182/798) on his suitability for the judiciary. Abū Yūsuf, eminent Ḥanafī jurist and the first chief justice in Islamic legal history, was appointed by caliph Harūn al-Rashīd to oversee the judicial administration in the Empire, and to advise in judicial matters. If the caliph did not himself appoint judges, a central innovation of Abbasid judicial policy, this task was delegated to the chief justice, like in the present case.[804]

[803] On the appointment procedure of the judiciary as part of the centralization and professionalization of judges, see Chapter Four, I.1.and 2.
[804] On the delegated responsibility of chief justices in the nomination and removal of judges, see Chapter Four,I.1.b.

The incident illustrates supreme approval of a judge seeking consultation as a guide for good adjudication and as a means to prevent errors in adjudication, even when the solution of the case appears clear-cut and obvious[805]:

[Chief Justice] Abū Yūsuf talked to ʿAbd Al-Raḥmān b. Mis-hir and wrote his appointment certificate (*ʾahd*), then he feared to appoint him as *qāḍī* because he did not see him sufficiently engaging with jurisprudence (*fiqh*). So Abū Yūsuf left [the affair pending] for a month.

One day they spoke with Abū Yūsuf on the errors of the judges.

[Judicial candidate ʿAbd al- Raḥmān b. Mis-hir] said: It surprises me that *qāḍīs'* err.

[Chief justice Abū Yūsuf] said: What about when a man takes over adjudication and two [adversarial] parties approach him on a case [as clear and lucid] as the sun?

[ʿAbd al-Raḥmān]: He judges the case and if the case causes a problem he refers them to another court session (*majlis*). And there are many who do the same [and refer to another court session]. He addresses someone and seeks consultation (*tashāwir*) and researches (*tabḥath*), and then it is impossible to not see the truth (*al-ḥaqq*).

Abū Yūsuf [said to ʿAbd al- Raḥmān]: Where were you on this issue a month ago? Take your appointment certificate and work according to these [principles].[806]

The case shows that for renowned jurist and chief justice Abū Yūsuf the judicial candidate needed one qualification to show his competency in handling adjudication: the willingness to request consultation on legal questions that will be brought before him, even those that seem to have obvious ruling. It is this readiness that overcame Abū Yūsuf's reluctance over whether the judicial candidate was actually sufficiently engaging with the law and thus suitable for adjudication. Only after examining the judicial candidate, attesting his willingness to solicit consultation and research the cases, could the chief justice hand over the appointment certificate to the judge.[807]

For Abū Yūsuf, the principle of consultation served as a crucial compass for a proficient judiciary and a satisfying adjudication. Consultation was to prevent errors of legal reasoning from occurring in judgments.[808] Consultation is thought of as something a *qāḍī* should not refrain from requesting. He should indeed reach out to avoid errors in

[805] This corresponds with the Ḥanafī understanding of judicial consultation that does not condition consultation on any legal difficulty but should be conducted independent of the perceived difficulty of the case, see Chapter Two, V.2.a. aa and b. aa.
[806] Wakīʿ, *Akhbār al-quḍāt*, III, p. 318.
[807] On similar examination entries for the judiciary as part of the professionalization of judges, see Chapter Four, I.2.c. and on appointment certificates as written documents constitutive for the bureaucratization of the judiciary, see Chapter Four, I.3.d.
[808] See Rebstock, "A Qāḍī's Error" (1999) on how establishing criteria (*shurūt*) such as legal, moral-religious, physical and educational for the choice of judges serves as a prevention for qāḍī's errors. Here Abū Yūsuf seems to specifically address an additional criterion, namely that the willingness to solicit consultation. See also Chapter Two, V.2.aa.

adjudication. The willingness to seek legal consultation was thus established with caliphal sanction as an explicit requirement for the *qāḍī* position.

Two caveats apply: the source neither explicitly refers to the request of a *fatwā,* nor does it clarify from whom the advice is to be requested. As in the normative writings of Shāfiʿī and the Ḥanafī jurist Khaṣṣāf, the respective verb forms of *mushāwara* were used, not, however, of *istiftā'* (seeking a *fatwā*). But is consultation the same as requesting and receiving a legal opinion? Also, neither the chief justice nor the judicial candidate characterized the consultant in his or her qualities, a *muftī* is not explicitly mentioned. Yet, there seems to be no anchor point to assess a difference between the two types of requesting advice, i.e. between a legal opinion (*fatwā*) and consultation (*mushāwara*)[809], and no difference set out between a jurisconsult (*muftī*) and a judicial consultant (*mushīr*)[810] As discussed above in Chapter Two[811], though, these terms were used synonymously in the normative literature. The following historical cases of judicial consultation confirm that the consulted individuals were almost all jurists. Some of those exercising judicial consultation are in the following cases explicitly referred to as *muftīs*, such as Layth b. Saʿd (d.175/791), leading jurist and "alone in his time to give fatwās in Egypt"[812];ʿUthmān b. Muslim (or b. Sulaymān) al-Battī (d.143/760-61), one of the renowned jurists of Basra[813], as well as prominent jurist Mālik b. Anas.[814] Some of these jurists had been or later became judges themselves, such as Muḥammad b. Bakkār (142-216/759-831), a legal scholar who was considered to belong to the people of *fatwā* (*ahl*

[809] Badry *Die zeitgenössiche Diskussion um* den *islamischen Beratungsgedanken* (1998), p. 58 where she sets the term *mushāwara* and its verbal forms apart from *naṣīḥa*/*nuṣḥ*/*naṣḥ* (well-meant advice) as an obligation for every Muslim, while *mushāwara* has the connotation of an expert avice and thus refers to particular professional groups. Also, in *musḥāwara*, consultation is requested, the counsel-giving side does not initiate or activate his advice (while in *naṣīḥā* avice is giving on the initiative of the counsel-giving side), p. 55. Badry states that advising, consulting, and counselling can take many forms, similar to the Latin *consulere*, *consultare*, specifically aimed, however at a decision-making-process, p. 65. Badry, *Die zeitgenössiche Diskussion um den islamischen Beratungsgedanken* (1998), pp. 55-65.

[810] The term *mushīr* reflects Shāfiʿīs choice for the one the judge should consult with, Shāfiʿī, *Kitāb al-umm*, VI, p. 219. It is not used in any of the judicial chronicles or further sources that contain empirical case material.

[811] On the overlap between judicial consultation (*mushāwara*) and giving a *fatwā*, see Chapter Two, III.

[812] "…wa kāna qad istaqalla bi'l fatwā fī zamānihi bi-Miṣr." Ibn Saʿd, *al-Ṭabaqāt*, VII, p. 517; Zaman, *Religion and Politics* (1997), p. 150.

[813] Ibn Saʿd, *al-Ṭabaqāt al- kubrā*, VII, p. 257; Ibn Qutayba, *al- Maʿārif*, p. 347 ; al-Dhahabī, Siyar aʿlam al-nubālā', VI, p. 148. On al–Battī, see van Ess, *Theologie und Gesellschaft* (1997), II, p. 146- 147; Melchert, *The Formation* (1997), p. 41; Tsafrir, *The History* (2004), p. 31. Tillier, *Les Cadis* (2009), p. 146.

[814] Al-Nawawi, *Adab al Fatwā*, p. 18; Masud/Messick/Peters, *Islamic Legal Interpretation: Muftis and Their Fatwas* (1996), p. 20.

al-fatwā) in Damascus, before being appointed as judge in the same city.[815] It is unlikely, though, that the judge issued legal opinions over the same cases he presided over.[816]

Commonly, scholars at that time were identified by their contemporaries as *muftīs* when they were known to engage in *fatwā*-giving [817] and some were literally listed as *muftīs* of cities, such as the *muftī* of the Iraqi city of Raqqa.[818] So while the terms *muftī* and *fatwā* do not occur in our judicial chronicles, some of the jurists who exercise judicial consultation are in additional empirical sources, such as biographical dictionaries, specified as *muftīs*. Lacking any trace of evidence that judicial consultation and *fatwā*-giving – and judicial consultant (*mushīr*) and jurisconsult (*muftī*) – are distinct and separate activities or functions, shall allow the continuous simultaneous use of both notions.

The examination of the judicial candidate Mis-hir suggests that a lack of engagement with the law needed to be made up by the willingness of soliciting advice from an extrajudicial authority. It would be misleading to assume, though, that consultation was employed (only) as a tool against ignorance. In the following, a number of historic examples shall show that advice was not only sought by the legally less competent. *Qāḍīṣ*, the very learned and the less learned, sought consultation of those external to the court, reflecting the need to seek extrajudicial backing, be it in discerning the law, or legitimizing the ruling.

bb. Re-Appointing *qāḍī ʿAbd al-Sallām*

In a similar case, willingness to seek legal consultation was again made an explicit requirement for the *qāḍī* position, and once more considered a key anticipatory means to avoid errors in adjudication.

[815] Ibn Ṭulūn, *Quḍāt Dimashq*, p. 18.
[816] Wakīʿ notes one incident in which a judge issued a legal opinion (*qāḍī yuftī*) while in office. However, the judge gave his legal opinion on a question of rituals (no cutting the hair when buying the sacrifice), i.e. on a question that is non-justiciable, Wakīʿ, *Akhbār al-quḍāt*, II, p. 305.
[817] For example legal scholar ʿAbdallah (or ʿUbaydallah) b. ʿAmr (d. 181/ 797), see Ibn Saʿd, *Ṭabaqāt*, VII/II, p. 182; Ibn Ḥajar, *Tahdhīb*, VII, p. 38, see Tsafrir, *The History* (2004), p. 85.
[818] *Muftī* of Raqqa ʿAbd al-Mālik b.ʿAbd al-Ḥāmīd al-Maymūnī (d. 274/887), Ibn Abī Yaʿla, *Ṭabaqāt al-Ḥanābila*, I, p. 213; Dhahabī, *Tadhkirāt al-ḥuffāẓ*, II, p. 603; Tsafrir, *The History* (2004), p. 85.

Under caliph al-Maʿmūn, governor Jaʿfar b. ʿAbd al-Waḥad examined [judicial candidate] ʿAbd al-Sallām b. ʿAbd al-Raḥmān al-Wābiṣī.[819]

When Jaʿfar b.ʿAbd al-Waḥad planned to appoint ʿAbd al-Sallām in the far lands of Egypt he posed one question after the other to him in which he (Abd al-Sallām) erred.

- [Governor] Jaʿfar said to him: On which basis were you [previously] appointed to the lands of Egypt and Baghdad?

- ʿAbd al-Sallām said: Based on jurisprudence (*fiqh*).

- Jaʿfar: But you erred in these questions.

- ʿAbd al-Sallām said: Look to my judgments. If I err in anything to your opinion, I will ask for consultation in these affairs (*'ushāwir fīha*). And these [questions you have just posed to me] I had not consulted (*'ushawir fīha*) anyone in.

- Jaʿfar said: Take your letter of appointment and go. [820]

With his pledge to request consultation, ʿAbd al-Sallām (d. 249/863) became judge of the Iraqi city of Raqqa were he served for 4 years until 237/851 when caliph al-Mutawakil removed him from office.[821] Apparently, however, this removal was no sign of bad tenure and disapproval of his adjudication, since ʿAbd al-Sallām was re-appointed to Baghdad and then again to Raqqa.

Again, the willingness to consult was considered a necessary condition to be re-appointed judge. The judge's previous errors were reportedly based on him not soliciting consultation. This was an explanation that fully convinced caliph Ma'mūn. Consultation with an extrajudicial authority was seen as a legal instrument to avoid errors. Thereby, consultation was considered a means to guarantee a certain quality of judgments.

The jurisconsult thus acted as a possible corrective, precluding faults in adjudication. Thereby, the jurisconsult was being involved in the result and quality of the judgment, sharing adjudicative authority. This is how the judges qualify the role of the jurisconsult: to prevent errors in adjudication, whenever the initiative of the judge requests them to do so.

In return, the judges needed to have one important qualification that is succeedingly analyzed: the judge needs to know who, how and when to ask for legal advice. Differently put, the judge needs to display an acute awareness for the epistemological challenges in law. In this logic, the less competent judge who knows of his deficiencies is therefore not necessarily less qualified.

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[819] There is no information available on which school of law judge ʿAbd al-Sallām adhered to, see also Tsafrir, *The History* (2004), p. 52.
[820] Wakīʿ, *Akhbār al-quḍāt*, III, p. 278.
[821] Wakīʿ, *Akhbār al-quḍāt*, III, p. 278.

We thus return to the questions raised in Chapter One: Was consultation requested because of the judge's ignorance? Was consultation a means to distinguish the lay judge from the jurist-judge?

cc. *Qāḍī ʿĀbis*: The Ignorant or Modest Judge

The following two versions of the examination of a *qāḍī* reveal how close ignorance and modesty can be in situations of legal uncertainty.

When [the fourth Umayyad caliph, d. 685] Marwān b. al-Ḥakam came from Damascus to rule over Egypt he asked who the *qāḍī* was. He was told that it was ʿĀbis b. Saʿīd. [The caliph] requested to see him and interrogated the judge [as for his merits to occupy the office of judge]:

- Do you know the Qur'ān by heart (*jamaʿt al-Qur'ān*)?
- The *qāḍī* said: No.
- Can you apply the Qur'ānic laws of inheritance (*al-farā'iḍ*)?
- The *qāḍi* said: No.
- Do you write down your judgments (*taktub fi yadak?*)? [822]
- The *qāḍī* said: No.
- So on what basis do you judge (*fabima taqḍī*)?
- The *qāḍī* replied: I judge based on what I know, and I ask in what I am ignorant.
- And Marwān answered: You are [indeed] a judge (*inta al-qāḍī*).[823]

While this version suggests that this judge was largely ignorant in legal affairs, another account portrays the same judge as a rather legally knowledgeable person:

- Marwān asks him: Do you have knowledge of the laws of succession (*aʿlimta al-farā'iḍ*)?
- The *qāḍī* said: No.
- Have you entirely grasped the Qurān?
- The *qāḍī* said no.
- He asked him: So how do you judge?
- The *qāḍī* said: What I know of I judge, and what I am ignorant of, I ask about.
- Marwān said: So judge on this basis!

[822] Juynboll translates this sentence as" Can you write?", Juynboll, *Muslim Tradition* (1983), p. 83.
[823] Kindī, *Kitāb al-Wulāh*, p. 312.

Then Marwān asked him about a law of inheritance (*farīḍa*), and he answered correctly. And he asked him about a question on divorce and he answered rightly, and he asked him about something from the Qurān and he answered rightly.

- And Marwān said: Oh you servants of God, are you not surprised about ʿĀbis who said that he does not know the religious duties and the Qurān? However, the believer shows his modesty.[824]

What first appears as a report on (yet another) ignorant judge, is modified in the second report where the judge is indeed capable of correctly answering the legal questions posed to him by the political authority examining his knowledge.

The account of judge ʿĀbis is actually from the start of the Umayyad period in Egypt and thus pre-Abbasid. This is important in that there is a significant and evidenced transformation in the legal background of the judges from the Umayyad to the succeeding Abbasid period: The judges quickly become more legally knowledgeable.[825] Though some of the Umayyad judges were jurists[826], the further systematization of the law during the Abbasid period also produced an increasing number of versed jurists for the judiciary. And this did not decrease the incidents of and writings on judicial consultation (*mushāwara*).[827] Thus, the chronicler Wakīʿ's judgment of the *qāḍī* of Basra Khālid b. Thalīq, qualified by Wakīʿ of being "ignorant in adjudication" (*jāhil bi'l-qaḍā'*), needs to be modified with a look into the list of judge Thāliq's writings, as contained in the bibliographical catalogue *Fihrist* of Ibn Nadīm.[828] *Qāḍī* Khālid b. Thalīq was, at least, the author of many books of genealogy and history but admittedly no jurist.[829] *Van Ess* argues that probably half a century earlier no one would have even taken notice of a judge who was a non-jurist[830]: By the time of *qāḍī* Khālid, the judiciary became increasingly legalistic, versed and competent in law: Most judges of the early Abbasid period, at least in Iraq, had an identifiable legal background.[831]

Studying the knowledge of the *qāḍīs* in the first two centuries of Islamic legal history, *G.H.A. Juynboll* underlines that some badly knew the law (*fiqh*) and that they rather

[824] Kindī, *Kitāb al-Wulāh*, p. 312.
[825] Johansen, "Wahrheit und Geltungsanspruch" (1997), p.979.
[826] Kindī, *Kitāb al-Wulāh*, p. 314.
[827] See for example the work of 12th century Al-Qarāfi, Jackson,"Typology of Mufti and Qadi" (1992), p. 80.
[828] Wakīʿ, *Akhbār al- quḍāt*, II, p. 127, 130; Ibn al-Nadīm, *al-Fihrist*, p. 151.
[829] Ibn Nadīm, *al-Fihrist*, pp. 107, 9-11, van Ess, *Theologie und Gesellschaft* (1997), II, pp. 123-124.
[830] Van Ess, *Theologie und Gesellschaft* (1997), II, p. 124.
[831] Van Ess, *Theologie und Gesellschaft* (1992), II, p. 124. Tillier, *Les Cadis* (2009), p. 191, Johansen, "Wahrheit und Geltungsanspruch" (1997), p. 988, 991.

trusted their common sense [832]: it is almost in those terms which that famous jurist Hilāl al-Ra'y (d. 245/ 859) recalls judge ʿAbd Allāh b. Sawwār (d. 228 / 842): "he did not know how to make things properly (*mā yuḥsinu shay' an*), but he was gifted with reason and with intelligence (*kāna dhā' 'aql wa-fahm*) and he took advice from others around him." [833] Under the ʿAbbasids, most *qāḍīs* of Iraq can be considered to be legal scholars, and their legal school affiliations are often identifiable, even if some followed the teachings of more than one school of law. Some are certainly accused in the sources of having deficient legal knowledge, but they belonged, at least, to the learned legal elite of their city.

The degree of excellence in the field of scholarly knowledge is in fact generally difficult to determine: the judges' reputation is often affected by the more or less good impression that they leave behind in the city after they quit adjudication, and by the assessment of the succeeding authors evaluating their work, influenced by their own knowledge.[834] The label ignorant could denote respect for the judge rather than his actual educational background. The type of complaints about Khālid b. Thāliq shows that he represents one of the last of his kind: the non-jurist judge.

dd. *Qāḍī Yaḥya* and Jurisconsult *Rabīʿa*: Soliciting Consultation from School Colleague Back Home

The following account confirms that also learned judges valued and practiced consultation.

When the Medinan Yaḥyā b. Saʿīd al-Anṣārī became the first *qāḍī* of Baghdad, he is said to have turned to Medinan scholars for legal advice: According to Wakīʿ, jurist Rabīʿa b. Abī ʿAbd al-Raḥmān (d. 136/753), known as Rabīʿat al-Raʾy, was requested from Medina to Iraq at the command of caliph al-Manṣūr, and in response to Yaḥya's call, to assist the *qāḍī*,[835] probably in consultation.[836] In another version on the same page, Yaḥya only

[832] Juynboll, *Muslim Tradition*, p. 94. Juynboll focuses on the question of the role the qāḍīs had in spreading ḥadīth, and their respective knowledge of ḥadīth.
[833] Wakīʿ, *Akhbār al-quḍāt*, III, p. 130. Similarly on the intellectual capacities of judge Abū Waṭīla Iyās Muʿāwiya b. Qurra b. al-Muzānī who was remembered as a gifted judge yet without referring to either Qur'ān or any of the ḥadīth and basing his judgments on common sense, see Wakīʿ, *Akhbār al-quḍāt*, I, p. 373; van Ess, *Theologie und Gesellschaft* (1997), II, p. 124.
[834] Tillier, *Les Cadis* (2009), p. 192.
[835] Wakīʿ, *Akhbār al-quḍāt*, III, p. 242. According to *Kasassbeh*, *The Office of Qadi* (1990), p. 76 Rabīʿa was made judge in al-Anbār already under caliph al-Saffāh. This is how *Kassassbeh* interprets the passage in Ibn Qutayba, *al-Maʿārif*, p.496, according to which the caliph made him come to Iraq "for the judiciary" (aqdama-hu li-l-qaḍā'). Another source claims that he came to Iraq under the first Abbasid caliph al-

corresponded with Rabīʿa. If this were true, then consultation in writing, as mentioned also by Khaṣṣāf in his *adab al-qāḍī,*[837] was indeed another practiced form of consultation, next to the oral.

Both Rabīʿa and Yaḥya were prominent jurists and followers of the legal tradition of Medina.[838] Yaḥya was considered one of the principal teachers of eminent jurist Mālik b. Anas[839], and thus of a highly educated legal background. And so was Rabīʿa al-Ra'y, himself a Medinan jurist and also teacher of Mālik b. Anas.[840] Legal consultation was then apparently not necessarily a question of soliciting knowledge that the requesting side lacked. It was not reflecting an asymmetry of knowledge between the knowledgeable jurisconsult and the less or non-knowledgeable judge.

Rather, the example of qāḍī Yaḥyā b. Saʿīd al-Anṣārī reveals the difficulties in adapting Medinan-Mālikī law to the particular Iraqi context. Wakīʿ documents how Yaḥya b. Saʿīd was called by the first Abbassid caliph to exercise adjudication. The renowned jurist, who had left Medina bragging to Rabīʿa of "knowing it all," wrote him some time later that his first two litigants had brought before him a case in which he felt foreign and which he did not know how to solve.[841] The facts of that case unfortunately were not documented. Still, the incident reveals that a judge coming from Medina to Baghdad was confronted with cases previously unknown in Medina, which left the judge of the city legally disarmed[842]—and in need of legal consultation.

The incident shows the voluntary request of a judge for assistance by a jurisconsult who could consult him on questions that pose legal problems to him. The problems that Yaḥyā encountered must have been of the kind that the judge, trained and a follower of Mālikī law, adjudicated in a city where Mālikī law was unknown and thus little respected.[843] Even a knowledgeable judge can lack competence in unfamiliar settings. One might have

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Saffāḥ, who planned to appoint him *qāḍī* there al-Khatīb al-Baghdadi, *Ta'rīkh Baghdād*, VIII, p. 421. If Rabīʿa, a client (*mawlā*) of Quraysh, died as early as 136/ 753, as the biographical dictionaries claim, this report is apocryphal, but even then it probably reflects some historical truth. Tillier, *Les Cadis* (2009), p.151.

[836] Tillier, *Les Cadis*, p. 151.

[837] Khaṣṣāf, *Adab al-qāḍī*, sec. 19, p. 42. See Chapter Two, V.2.a.aa. (1.).

[838] Schacht, *Origins* (1950), pp. 247-248; idem, *Introduction* (1964), p. 31.

[839] Hallaq, *Authority* (2001), p. 33.

[840] On Rabīʿa al-Ra'y, see al-Zirklī, *al-A'lām*, III, p. 17; Ibn Khallikān, *Wafayāt al-a'yan*, II, p. 288; Tillier, *Les Cadis* (2009), p. 151.

[841] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 242. See also al-Nubāḥī, *Ta'rīkh quḍāt al- Andalus*, p. 10. Tillier, *Les Cadis* (2009), p. 151.

[842] Tillier, *Les Cadis* (2009), p. 151.

[843] Tsafrir, *The History* (2004), p. 40.

expected that in such a situation a judge would have sought advice from local jurisconsults in order to dispense justice in accordance with local laws and customs. It is interesting to see Yaḥya requesting the aid of a fellow Mālikī scholar from Medina, instead of a local scholar from Baghdad who would have filled him in on the unfamiliar parts of Baghdadī law. Judicial advice in this case came from a jurisconsult of the same school as the judge's. The judge responded to this situation of insecurity by requesting the aid of an extrajudicial consultant from his own school—presumably because he trusted him.

The key to this case thus seems to be the change of locality of the judge from Medina to Baghdad. The mobility of the judge, a recurring theme of Abbasid judicial policy, explains in part some of the insecurities that make consultation perceived as necessary: The judge's awareness and conflictual situation of an encounter with different school doctrines, legal culture and local custom – a legal pluralism affecting adjudication and its rulings – required judicial consultation to cope with the demands of each locality.[844] This is particularly true given that the law of the Abbasid Empire was not codified and only began to be canonized, and at that time displayed a diversity of doctrine and custom that produced a fragmentary scheme of the law, with scholars employing Islamic law to standardize the overall legal architecture.

b. Judges' Choice of Jurisconsults

Even when the judge displayed his willingness to solicit consultation, he would still have to choose carefully on whom to rely for this task. This is even more important given that the normative literature recommends to consult with the legally knowledgeable, with those who can exert independent legal reasoning and master the foundational disciplines of the law and display piety as a form of personal and professional integrity.[845] The following examples demonstrate that judges differed in their preference for local or non-local counsel.

[844] On central appointments of Abbasid judicial policy and state of the law in the Empire, Chapter Four I.1.
[845] See the normative discussion in Ḥanafī and Shāfiʿī legal writings in the *adab al-qāḍī* literature, Chapter Two, V.2.

aa. Choice of a Council of Local Jurisconsults

An early noteworthy instance is that of a case brought before Iraqi judge Shurayḥ (d.78/697) while several seniors (*āshyākh*) were present and sat next to the judge.[846] It is not clear whether these seniors sat there as notabilities or as scholars. Further, it is not apparent if they functioned as a jury or as a council of justice.[847]

More to the point is the following report: When judge Abū al-Bakhtarī (d. 192/807) from Medina was appointed judge in Medina, he was given a list of twenty-seven jurisconsults to assist him in adjudication.[848] It remains unclear by whom he was given the list of names. Judge Abū al-Bakhtarī requested to see all the jurisconsults (*mushirīn*), and they entered to see him. The next day, the judge chose seven of them.[849] Though we do not know anything about the jurisconsults' school affiliation, the fact that they could come and see the judge next day implies that they were local jurisconsults and thus affiliated with or close to the local Medinan school of Mālik. The judge chose multiple jurisconsults, not just one or two, which speaks to the idea of a consilium of jurisconsults.[850] In this case, the jurisconsults could well act as a local and collective authority, superior to the judge in number and knowledge about local legal specificities. Here, unlike in the case of Yahya, the newly appointed judge relied on local knowledge for advice. Similarly, Iraqi judge Bakkār prefered two local Egptian-Mālikī jurisconsults to complement his Ḥanafī legal knowledge when he was appointed to Egypt[851], as the following examples show.

bb. *Ḥanafī* Judge *Bakkār* in Egypt Reaching out to Local *Mālikī* Jurisconsults

When Bakkār b. Qutaybah (184-270/800-883) was appointed judge by caliph al-Mutawakkil in 246/860 and sent from Basra (Iraq) to Egypt for adjudication[852], he

[846] Wakīʿ, *Akhbār al-quḍāt*, II, p. 213. One of the seniors sitting with the judge were Abū ʿAmr al-Shaybānī [Isḥāq b. Mirār] (ca. 93–210/712–825) who was a well-known philologist and transmitter of poetry who lived in the early ʿAbbāsid period. See Vakili/ Rezaee, "Abū ʿAmr al-Shaybānī", EI (3).
[847] Masud, "The Study of Wakīʿ's" (2008), p. 121.
[848] Wakīʿ, *Akhbār al-quḍāt*, I, p. 247
[849] Wakīʿ, *Akhbār al-quḍāt*, I, p. 247; Masud, "The Study of Wakīʿ's" (2008), p. 121.
[850] Tyan, *Histoire judiciare* (1960), p. 214-218. Tyan, however, does not analyze the role of jurisconsults assisting the judge in his decisions.
[851] On judge Bakkār, see this Chapter Three, I.3.b.
[852] Kindī, *Kitāb al-Wulāh*, p. 477.

informed himself about potential local jurisconsults in advance by asking former judge, Muḥammad b. Abī Layth:

On his way to Egypt, Bakkār b. Qutayba met Muḥammad b. Abī Layth in Jifār, a sandy part between Gaza and al-Arish. Muḥammad b. Abī Layth returned to Iraq, removed from his position as judge. Bakkār said to him: I am a stranger and you got to know the lands (*al-balad*), so advise me on who I can ask for consultation *(ʻūshāwirhu*) and whom I can trust. Muḥammad b. Abī Layth mentioned two men: Yūnis b. ʿAbd al-Aʿlah and Musā b. ʿAbd al-Raḥmān b. al-Qāsim. The first intelligent (*ʾāqil*) and the latter ascetic (*zāhid*).[853]

Bakkār's choice of jurisconsults seemed to have been based on who knew the local law and customs and who could be trusted. Trust (*thiqa*) between judge and jurisconsult(s) seems to have been an important criterion for the judge to choose the jurisconsults.[854]

One of jurisconsults recommended by previous judge Abū Layth was Yūnus b. ʿAbd al-Aʿlā (d. 264/879) who was a Mālikī jurist and scholar teaching Mālik's seminal legal work Muwaṭṭa in Egypt and an expert in ḥadīth (*muḥadith*). Later famous jurist Ṭabarī is said to have studied Mālikī jurisprudence with him.[855] Yūnus then gradually started spreading Shāfiʿī law in Egypt and lateron became one of six leading transmitters of Shāfiʿīs teaching in Egypt.[856] The jurisconsult thus was a scholar who engaged with jurisprudence and, at the time of Bakkār, represented the locally dominant legal school. The other jurisconsult was renowned legal scholar ʿAbd al-Raḥmān b. al-Qāsim, who died 191/806, was a disciple of Mālik b. Anas who had spread Mālikī teachings in Egypt and the Maghreb.[857]

[853] Kindī, *Kitāb al-Wulāh*, p. 506. The chronicle itself states that the authenticity of this statement is doubtful since Muhāmmad Ibn Abī Layth was imprisoned in Iraq and he had left Egypt in 241, five years before al-Bakkār had arrived in Egypt. Kindī, *Kitāb al-Wulāh*, p. 507. But whether the new and the old *qāḍī* really met in Gaza and whether Bakkār asked to be recommended a jurisconsult is only of second importance – what does not seem to be disputed is the fact that Yunūs did in fact advice Bakkār in ongoing litigation.

[854] Later on, the idea of trust as a criterion developing for choosing consults, especially in the political realm. Badry, *Die zeitgenössische Diskussion* (1998), p. 145, though without further references. It was not considered necessary for the questioner to assess a potential *muftī's* scholarly reputation, basing his choice on secure public information as to the qualifications of the individual, not just for knowledge or teaching but specifically for *fatwā*-giving. Researching and evaluating information about scholarly credentials was not discussed as a required preparatory step before approaching a jurisconsult since *muftīs* typically are well known in the respective local community. Masud/Messick/Peters, *Islamic Legal Interpretation* (1996), p. 21.

[855] Ibn al-Nadīm, *Fihrist*, p. 234; Melchert, *The Formation* (1997) pp. 81, 191.

[856] Al-Nawawī, *Tahdhīb*, II, p. 284; Melchert, *The Formation* (1997), p. 80.

[857] Qāḍī Iyād, *Tartīb al-Madārik*, III, p.245.

Judge Bakkār himself was a Ḥanafī scholar who studied legal contractual formularies (*shurūt)* and jurisprudence (*fiqh)* from famous Ḥanafī jurist Hilāl b. Yaḥya al-Rāwī[858] and from ʿIsa b. Abbān. He narrated *ḥadīth* (*ṭalab ḥadīth*) from a grand number of the teachers from Basra and is also recorded as a credible transmitter of *ḥadīth* so that many narrated ḥadīth were referred back to his authority.[859] He eventually played a major role in establishing the Ḥanafī school in Egypt.[860] Despite his loyalty to the Ḥanafī school, judge Bakkār did not shy away from seeking consultation from scholars of Mālikī law. Bakkār must have requested information on local scholars as he possibly was less well-read in Mālikī-Egyptian law and as he probably knew that this was the law the local population and the local legal community was accustomed to. Judicial consultation from two Mālikī scholars would allow him to complement his legal knowledge of Ḥanafī and Basran law.[861]

Bakkār seems in effect to have been a successful judge, as Kindī notes him having had "deep knowledge of adjudication (*ghayad al-ma'rifa fil qaḍā'*)"[862], kind, not corrupted and thanked by the people of his judicial district.[863] His success could furthermore be judged by the fact that he served in adjudication for 24 years.[864]

Judge Bakkār did not only make inquiries about local jurisconsults but is recorded to have requested both men's counsel and to have adopted them in ongoing judicial affairs: "Bakkār took his [Mūsa b.ʿAbd-Raḥmān] counsel (*'istashārahu*) and he followed his opinon (*akhadha bi ra'yihi*)."[865] He also asked for Yūnus' advice in a variety of unspecified cases[866]—and in a famous inheritance case, that went back and forth between Ḥanafī and Mālikī judges over generations. This case became known as the "house of the elephant" and is treated twice as revised case of judge Bakkār[867] as well as revisited case of appeal by a council of jurists further down.[868]

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[858] Kindī, *Kitāb al-Wulāh*, p. 477. His full name was also recorded as Hilāl b. Yaḥyā b. Muslim al-Basrī. On his biography see Hennigan, *The Birth of a Legal Institution* (2004), pp. 2-4, and on how he aquired the eponym "al-Ra'y" due to his great knowledge and/or his reliance on independent reasoning (*ra'y*).

[859] There is a list of people who narrated ḥadīth on his authority (*rawu 'anhu*), Kindī, *Kitāb al-Wulāh*, p. 505. On his religious knowledge Ibn Abī al-Wafā', *Jawāhir*, I, p. 458; Melchert, *The Formation* (1997). p. 47.

[860] Tsafrir, *The History* (2004), p. 38.

[861] Melchert, *The Formation* (1997), p. 80. Bakkār is also know as deeply engaging with Shāfiʿī legal thought, and refuting it in depth with Ḥanafī arguments, Kindī, *Kitāb al-Wulāh*, p. 512.

[862] Kindī, *Kitāb al-Wulāh*, p. 511.

[863] Kindī, *Kitāb al-Wulāh*, p. 477.

[864] Kindī, *Kitāb al-Wulāh*, p. 514. Bakkār is portrayed as an intellectually and moral-religiously apt judge: "Bakkār was knowledgeable in jurisprudence (*fiqh*) and used to weep when reading out the Qur'ān. And when he finished judging he would sit by himself and ponder over the verdicts he had issued". Kindī, *Kitāb al-Wulāh*, p. 507.

[865] Kindī, *Kitāb al-Wulāh*, p. 506.

[866] Kindī, *Kitāb al-Wulāh*, pp. 474-475.

[867] Chapter Three, I.3.b. on Ḥanafī judge Bakkār adopting Mālikī jurisconsult Yūnis' advice.

[868] Ibn Ḥajar, *Raf'al-Iṣr*, p. 124; Kindī, *Kitāb al-Wulāh*, p. 472-475, p. 502. The entire case is ranslated into French by Tillier, *Vies de cadis de Misr* (2006) p. 51.

cc. Choice of One Non-Local Jurisconsult

Chronicler Wakīʿ notes an instance where *qāḍī* ʿAbd al-ʿAzīz b. al-Muṭṭalib (judge in 141/758) in Medina refused to seek consultation from local legal jurisconsults.

> ʿAbd al-ʿAzīz b. al-Muṭṭalib was said to have never asked for anyones counsel (*lā yastashīru aḥadan*). And it was written to Mālik b. Anas that he, the judge, allegedly never consults anyone.
>
> When Mālik b. Anas [came to see and then] left the judge [he was asked]: Did he ask you for counsel?
>
> He said: No, he preferred a man from Khurasān over me. [869]

The case is exemplary in that it is the judge who makes the decision who he asks for counsel. He can refuse one, even great local legal scholar, like here Mālik b. Anas, who would know the laws (doctrine and legal customs) of the locality, and yet prefer another one over him.

dd. Refusing Consultation Altogether

Despite the strong rootedness of judicial and political consultation in the culture of the Arab peninsula, there may have also been judges who rejected advice altogether. Renowned judge Ibn Shubruma (d. 144 or 145)[870] was appointed under the Umayyads and confirmed in office by the succeeding Abbasid ruler.[871] He is reported to have preferred the ruling based on his own legal reasoning (*ra'y*), even if erroneous, instead of one arrived at through the consultation with ten scholars.[872]

I. Schneider cautions from taking this statement at face value. She suggests that it was used to reflect the early debates about the (dis-) approval of one's own legal reasoning in adjudication, at the expenditure of textual sources.[873]

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[869] Wakīʿ, *Akhbār al-quḍāt*, I, p. 205; Masud, "The Study of Wakīʿ's" (2008), p. 121.
[870] Wakīʿ. *Akhbār al-quḍāt*, III, p. 148.
[871] Wakīʿ. *Akhbār al-quḍāt*, III, p. 148.
[872] Wakīʿ, *Akhbār al-quḍāt*, III, p. 86, 121.
[873] Schneider, *Das Bild des Richters* (1990), p. 111.

c. *Abu Ḥanīfa* and judge *Ibn Abī Laylā*: Advice as Confrontation

The consultative relationship was in practice not always as harmonious as the normative writings and some of the empirical examples indicate, nor even voluntary. The examples of cooperation discussed so far contrast with a particularly prominent and early report of judge and jurisconsult publicly clashing. In this example from the second/eight century, the judge did not request the consultation of the jurist—much the opposite. The legal opinion of the jurist came against the judge's will and was fought off by the judge as a clear challenge to his authority, all the more so as the incident involved two of the most renowned legal figures of their time: eminent jurist Abu Ḥanīfa and judge Ibn Abī Laylā. The following, as recounted by the legal author, later judge and chief justice Ibn Khallikān in the 7th/13th century, is thus an account of competition over legal hegemony. The dispute between them was sharp and showed anything but a relationship of consensual cooperation in making law. It is an early example of the *fatwā* employed as a critique of adjudication.

Ibn Abī Laylā held the post of *qāḍī* for more than thirty years[874] and was one of the most influential legal figures in Kufa in the second/eighth century. He was appointed *qāḍī* during the Umayyad period and was confirmed in office by the Abbasids.[875] His legal views influenced many of the leading scholars in Kufa, both his fellow *ahl al-ra'y* (proponents of the method of arriving at legal decisions by human reasoning) and their opponents, the traditionists. Abū Ḥanīfa, eponym of the Ḥanafī school, preferred to remain a legal scholar and was critical of adjudication, and he had suffered imprisonment because he refused to become *qāḍī*.[876] Tensions between Ibn Abī Laylā and Abū Ḥanīfa were known even though both belonged to the *ahl al-ra'y*.[877] Ibn Abī Laylā was not a Ḥanafī, though.

According to Ibn Khallīkān, Abu Ḥanīfa had openly criticized a judgment and enforcement order Ibn Abī Laylā had passed against a woman accused of defamation,

[874] Ibn Khallikān says that he was qāḍī for 33 years, *Wafayān al-a'yān*, IV, p.179, while Tsafrir, *The History* (2004), considers this to be an exaggeration and assumes that he was qāḍī for more than twenty years, p. 127, note 42.
[875] Wakīʿ, *Akhbār al quḍāṭ*, III, p. 148.
[876] See for instance, Ibn Khallikān, *Wafayān al-'ayān*, V, p. 414.
[877] Tsafrir, *The History* (2004), p. 25. Different dogmatic beliefs and their political ramifications also separated Ibn Abī Lāyla (whe held anti-Murjiʿī beliefs) from Abū Ḥanīfa. Tillier, *Les Cadis* (2009), p. 495. The legal disputes between Abū Yusuf and Ibn Abī Layla were preserved in Abū Yūsuf, *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Layl*ā, arguably the first comparative legal work in Islamic law.

namely a slanderous accusation of fornication (*qadhf*). This kind of defamation constitutes a *ḥadd* crime. Such crimes are defined as offences with fixed, mandatory punishments that are based on the Qur'ān. They include theft, banditry, unlawful sexual intercourse, an unfounded accusation of unlawful sexual intercourse (slander, calumny, defamation), the consumption of alcohol, as well as apostasy (according to most schools).[878] They are considered a violation of public interest, and thus do not fall within criminal law. Thus, these crimes are usually covered by the *qāḍī's* jurisdiction, and not, like criminal cases, with police jurisdiction (*shurṭa*). [879]

Judge Ibn Abi Laylā had sentenced the woman to twice the lashes prescribed for this type of crime because she was said to have accused her interogator, the judge, as being the "son of two fornicators" (*ibn al-zāniyayn*). The details of this story, however, may be exaggerated to aggrandize Abu Ḥanīfa, known at the time when Ibn Khallikan reported the story as the founder of one of the four main schools of law (*madhhabs*).[880] Abū Ḥanīfa believed the decision to be wrong both in the substantial law applied as well as in the legal procedure he adopted. The text indicates that Abū Ḥanīfa issued a *fatwā,* referred to as "afta"—though we do not know if "afta" is the verb used at the time, or one chosen later by Ibn Khallikān.

The dispute was thus clearly one on what would be considered the better legal reasoning, both in substance and procedure. The case reveals not only that different legal positions could be taken on the case, i.e. that the authoritative texts did not produce closure on this issue, but also that for both their legal understanding of the law was at stake. Little did it matter that the *fatwā* was non-binding; it was an open challenge to the judge's (coercive) authority. To fend off the criticism, the judge did not know how to help himself other than by involving a third party with coercive authority over the jurist. Ibn Abī Laylā reacted by complaining to the governor of Kufa, asking him to prohibit Abu Ḥanīfa from taking any position on his judicial practice.[881] The governor complied and forbade Abū Ḥanīfa to issue *fatwās*.[882]

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[878] Peters, "Crime and Punishment" (2006), pp. 53-65, including the different takes of the schools of law on including punishment based on Sunna, the classification of *ḥadd* as (public) claims of God, and the strict rules of evidence for these crimes.
[879] Johansen ,"Zum Prozeßrecht der ʿuqubāt" (1997), p. 477.
[880] Ibn Khallikān, *Wafayān al-ʿayān*, IV, p.180; al-Ṣafadī, *al-Wāfī bi-l-wafayāt*, p. 222-223; Tillier, *Les Cadis* (2009), p. 495.
[881] Ibn Khallīkān, *Wafayāt al-aʿyān*, IV, p. 180; al-Ṣafadī, *al-Wāfī bi-l-wafayāt*, III, pp. 222-223; Tillier, *Les Cadis* (2009), p. 495.
[882] Ibn Khallikān, *Wafayān al-ʿayān*, IV, p. 180.

The coercive authority of the judge vis-à-vis the litigants found its boundaries in the authority of the jurisconsult. In the face of the strong authority of jurisconsult Abū Ḥanīfa, judge Ibn Abī Layla had to request an external, political authority to aid him in silencing his critique. We do not know if any consultation occurred prior to judge Ibn Abī Layla issuing his judgment, but this did not hinder Abū Ḥanīfa from nevertheless issuing his critique afterwards and against the will of the judge.

In keeping with the normative writings discussed in Chapter Two, the historical examples tend to demonstrate a general willingness among judges or judicial candidates to solicit legal consultation, in particular as a preventive means to avoid errors in adjudication, if not as a *conditio sine qua non* for good adjudication. Errors in adjudication could, *vice versa*, be explained by the fact that no consultation had been sought and that the *qāḍī* decided the case by himself without a consensual legal reflection with a jurisconsult. This may, in part, also have been a factor in this last case; apparently, Ibn Abi Laylā had taken his sweeping judgment without prior consultation, making himself vulnerable to scathing criticism from his learned colleague.

2. (Un-)Making Judges: Jurisconsults Advising the Caliph on the Choice of Judges

Legal scholars had ways to affect adjudication way before getting to the question of *what* the law should be: they exerted authority over *who* the judge should be, both in appointing and removing judges from office, particulary when their law school affiliation differed and, most importantly, led to differences in substantial law.

a. Abbasid Centre: Iraq

Iraq was not only the political centre of the Abbasid Empire ever since the Abbasids transferred the centre of Muslim caliphal power from Damascus to Iraq right at the beginning of their reign. It was already previously one of the Islamic learning centres *par excellence*. Diverse circles of learning evolved into influential schools of law, theology and philosophy, attracted many students and scholars who came to take part in what developed into an Islamic culture of learning, with Iraq considered the cradle of learnedness.[883]

[883] On the importance of Iraq for the political, legal and intellectual development in Muslim legal history, see Chapter One, I.3.b.

aa. Jurisconsult *al-Battī* Recommending Judge *Ṭalḥa b. Iyās al-ʿAdawī* for Nomination

From the very beginning of Abbasid reign, legal scholars seemed to have been mainly involved in finding candidates for the judicature.[884] Political authorities, be it caliphs or their delegates, such as chief justices or local governors, approached legal scholars to seek their opinion on the right candidate, although the sources seldomly describe the details and the precise role of the legal scholars in the selection and choice of judicial nominees.
One of the first Abbasid cases occurred in the Iraqi city of Basra, at the beginning of the reign of caliph al-Manṣūr, probably around the year 139/756-757.[885] At the time, the caliphal policy of centrally appointing judges was not yet systematically applied and the governor of Basra, Sulaymān b. ʿAlī, was still in charge of the nomination of the *qāḍī* of the city. Upon his request, renowned jurist al-Battī recommended judge Ṭalḥa b. Iyās as *qāḍī* of Basra:

> Following the death of [previous judge] ʿUmar b. ʿĀmīr, [governor] Sulaymān b. ʿAlī consulted (*shāwar*) [jurist] al-Battī to find a [new] judge, but [Al-Battī] asked to be exempted from this consultation (*mashūra*) and [the governor] exempted him from it. Then al-Battī learnt that Sulaymān orientated his choice towards Wahb b. Sawwār b. Zahdam al-Jarmī and towards another person.
>
> He therefore came to see him and said to him:- You had asked me for advice (*shāwartani*) about the man whom you would name and I had not liked to answer you; I could decline your proposal, but it seems to me today that I cannot any more, because I learnt that you orientated your choice to So-and-so. If you must really nominate somebody, I recommend you Ṭalḥa b. Iyās al-ʿAdawī: it is a man who has already exercised this function and who was praised [for his behaviour].[886]

The principal character of this story, ʿUthmān b. Muslim (or b. Sulaymān) al-Battī (d.143/760-61), was one of the renowned jurists of Basra, originally from Kūfa, Iraq, an

[884] Tsafrir, *The History* (2004), p. 30.
[885] Tillier assumes that it was around the year 139/ 756-757, Tillier, *Les Cadis* (2009), p. 146.
[886] Wakīʿ, *Akhbār al-quḍāt*, II, p. 56.

adherent of the principle of discretionary opinion (*ra'y*)[887], and a *muftī* who belonged to the nobility of Basra.[888]

Jurisconsult Al-Battī's recommendation is a result of a consultation between him and the Abbasid governor. It is, strictly speaking, not an example of judicial consultation but rather of political consultation: the jurisconsult is not advising a judge but a political authority. However, this consultation over the nomination of a future judge, an important factor of adjudication, crucially affects the authority balance between judge and jurisconsult. It is to be expected that the judicial candidates, who often came from the scholarly legal circles themselves, were well aware of the authority of the local jurisconsults in proposing judges.[889] The judges must have known that the political authorities like to solicit, and at times follow, the recommendations by the jurisconsults. The jurisconsult's advantageous position, or privilege, to be solicited by the political authorities on the judiciary thus has a direct affect on the jurisconsult's authority vis-à-vis the judge: By exercising persuasive authority in relation to the (coercive) political authority, he is in a position to affect the authority of the judiciary as an institution by shaping its body of staff, and to help establish or undermine the authority of the individual judge or judicial candidate in question, making or breaking careers. The importance of this privilege is confirmed by reaction of al-Battī in the second part of the story: in spite of the passive attitude that he initially showed, the person of the judge was of crucial importance and the judicial function could not be entrusted to whomever, so he eventually preferred to assume his role in the choice of the judge.

While we do not know which criterion motivated his final decision, Sulaymān b. ʿAlī ended up following the advice of al-Battī and appointing Ṭalḥa b. Iyās for the post of *qāḍī*.[890] We do not know what prompted al-Battī to discourage the governor from the first candidate, nor is it documented what school of law the new judge Ṭalḥa b. Iyās adhered to[891], and whether his law school adherence or any other particular criterion, or merely the jurisconsult's say, played any role in this case.

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[887] Ibn Saʿd, *al-Ṭabaqāt al- kubrā*, VII, p. 257; Ibn Qutayba, *al- Maʿārif*, p. 347 ; al-Dhahabī, *Siyar a'lam al-nubālā'*, VI, p. 148. On al–Battī, see van Ess, *Theologie und Gesellschaft* (1992), II, p. 146- 147; Melchert, *The Formation* (1997), p. 41; Tsafrir, *The History* (2004), p. 31. Tillier, *Les Cadis* (2009), p. 146.

[888] Van Ess, *Theologie und Gesellschaft* (1992), II, p. 146.

[889] On jurisconsults as legal scholars, see Chapter Four, III.

[890] Tillier *Les Cadis* (2009), p. 147.

[891] Khalīfa b. Khayyāt, *Ta'rīkh*, p. 272; Wakīʿ, *Akhbār al-quḍāt*, II, p. 55. See also Tsafrir, *The History* (2004), p. 39.

What we do know is that, with distinguished jurist al-Battī, one listened to someone whose legal positions were heard and accepted by a large part of the elite.[892] That the governor took the trouble to organise such consultation indicates that he did not want to alone carry the risk of choosing the judge of the city: either he was unsure who to nominate, or he wanted the backing and the legitimization of the jurisconsult for the choice of the new judge—a near-guarantee for judicial peace and stability which was needed in an Empire regularly threatened by upheavals. By receiving advice from such a renowned jurist, the governor could be sure to appoint somebody who would be accepted by the highest representatives of local legal thought.

The acceptance of the *qāḍī* by the grand local jurist(s) was vital in that the *qāḍī,* through them, acquired credibility and the necessary legitimacy which became the sources of his authority.[893] This reveals an asymmetrical relation of authority, one of approval from one (the jurisconsult) towards the other (the judge). Authority of the judge was vested in the acceptance of the legal scholar.

bb. Jurisconsults Acting to Remove Judge *Khālid* and Failing to have Judge *al-Anṣārī* Appointed

The authority of jurists in the choice of judges turns quasi-coercive in the next case. The case of *qāḍī* Khālid b. Ṭāliq involves a group of jurisconsults who first watch over and record the mistakes of the judge, then collectively move to have him removed, and finally have the opportunity—unsuccessful in the end—to contribute to the nomination process of a new judge. While the old judge was removed for his application of testimony law, the new judge did not succeed in being appointed for his take of endowment law. This is one of the cases that shows how jurisconsults constrained the judge by "watching out for infractions and slips," illustrating the rivalry between the local legal scholars and the judges.[894]

The confrontation between judge and jurisconsults starts with complaints documented regarding Khālid b. Ṭalīq, judge in Basra, Iraq who was appointed under caliph al-Mahdī (r. 158-168 / 775-785). [895] The story was first narrated by Muḥammad b. Slīmān al-Umawī, governor of Basra:

[892] Van Ess, *Theologie und Gesellschaft* (1992), II, p. 146- 147.
[893] Tillier, *Les Cadis* (2009), p. 147.
[894] Gibb/Bowen, *Islamic Society* (1957) II, p. 122.
[895] Khalīfa b. Khayyāt, *Ta'rīkh*, p. 289; Wakīʿ, *Akhbār al-quḍāt*, II, p. 123.

- What strange (*'ajā'ib*) things are coming out of this ignorant [qāḍī Khālid b. Ṭalīq]?

- He said: I told him that he forgets. So charge someone (*wakkil*) who keeps a record [of the strange things], writes them down and counts them.

- He said: He [governor Muhammad b. Sulaymān al-Umawi] ordered a group of people who would document his strange things that would occur in his judgments.

One of the examples they have in their records [against him] is that one known witness came to his court and three witnesses he did not know.

- The witness said: The one witness was considered sound, and the three [unknown] witnesses replaced one [trustworthy] witness. And he [the judge] issued the judgment based on their testimony. [896]

The judge who was being critiqued or perhaps even ridiculed for his adjudication being "strange" we have already encountered; he as the one mentioned by Wakīʿ as "ignorant judge", for he was a scholar but not a jurist.[897]

It remains vague whether the initiative to record the mistakes of the judge is an idea of the governor or of the local legal scholars, or of both. Either way, the jurisconsults formed a group to act as a controlling instance, with the authority to determine what is legally right or wrong, and thereby to evaluate the adjudication of judge Khālid b. Ṭāliq. The jurisconsults listed further mistakes of this judge, related to the laws of testimony: they concerned the number and trustworthiness of witnesses needed to serve as valid evidence or the criteria for a valid representative agent (*wakīl*) to appear instead of the litigant before court in case of the latters sickness.[898] At this point, it is difficult to reconstruct whether these were "obvious" mistakes or merely different takes of the laws of testimony at a time where a standardized Islamic law of testimony and procedure did not exist.[899] The rules of testimony that were established by the jurists did not, at least, reflect consistent judicial practice. Thus, the criteria of the number and integrity of acceptable witnesses applied by judges differed from those of jurists. Some judges like *qāḍīs* Zurāra [900], Ibn Abī Laylā[901], Ibn Shubruma[902], and Iyās b. Muʿāwiya,[903] decided cases on the basis of only one witness, while the jurists required two witnesses. Controversially, *qāḍī*

[896] Wakīʿ, *Akhbār al-quḍāt*, II, p. 127.
[897] Biographical information on judge Khālid in Wakīʿ, *Akhbār al- quḍāt*, II, p. 127, 130; Ibn al-Nadīm, *al-Fihrist*, p. 151.
[898] Wakīʿ, *Akhbār al-quḍāt*, II, p. 128.
[899] Masud, "The Study of Wakīʿ's" (2008), p. 123.
[900] Wakīʿ, *Akhbār al-quḍāṭ*, I, p. 293; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[901] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 117; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[902] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 117; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[903] Wakīʿ, *Akhbār al-quḍāt*, I, p. 331; Masud, "The Study of Wakīʿ's" (2008), p. 123.

Abū Bakr Ibn Ḥazm[904] allowed a son to testify in favor of his mother, and Shurayḥ allowed it in favor of the father.[905] Shurayḥ did not allow the testimony of a person prosecuted for wrongfully accusing another of adultery in a court[906], while Abū Bakr Ibn Ḥazm did allow it.[907] For the jurists, all such testimony was considered invalid.[908] Despite this uncertainty, the jurisconsults acted as a restraining authority to the judiciary, colluding with the political authority to control the "correct" application of their understanding of Islamic law of testimony, possibly as determined by their school teaching adherence.

The jurisconsults' confrontation with the judge had dire consequences for him. The governor of Basra sent a delegation of jurists to caliph al-Mahdī to request the removal of *qāḍī* Khālid b. Ṭāliq. He had ordered the scholars "to listen before their departure to all those who have to complain [about the *qāḍī*] or who can testify against him". The scholars put down in writing the complaints of the Basrans before leaving for the Abbasid capital Baghdad by boat. [909] Why did the governor not report the mistakes of the judge to the caliph himself? After all, he was a delegate of the caliph and his task was to administer the city and report to the caliph any malpractices of its functionaries, such as the judge. Maybe he considered the journey too onerous, or felt his absence would be problematic. But the governor must have also known, or at least hoped for, the effect and high standing the scholars' assessment of the judge would have on the caliph, and that they could effect judicial change. When *qāḍī* Khālid learned that the scholars were going to Baghdad, he reportedly insisted on not leaving his post.[910] Judge Khālid must have been well aware of the jurisconsults' actions and the threat they posed to maintaing his position as a judge. It remains unclear if the delegation of scholars was to any extent instrumentalized by the governor to remove the judge for political reasons.[911] The scholars in any case seemed to freely offer their advice to the central power to first complain, and eventually have the *qāḍī* replaced.

[904] Wakīʿ, *Akhbār al-quḍāt*, I, p. 146; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[905] Wakīʿ, *Akhbār al-quḍāt*, II, p. 276; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[906] Wakīʿ, *Akhbār al-quḍāt*, II, p. 284; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[907] Wakīʿ, *Akhbār al-quḍāt*, I, p. 146; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[908] Masud, "The Study of Wakīʿ's" (2008), p. 123.
[909] Wakīʿ, *Akhbār al-quḍāt*, II, pp. 128-129. Some reportedly said that the caliph requested the governor to collect the mistakes, i.e. that some higher state level instigated the evaluation the *qāḍī's* adjudication.
[910] Wakīʿ, *Akhbār al-quḍāt*, II, p. 128.
[911] Tillier, *Les Cadis* (2009), p. 166.

The legal and scholarly background of the six members of this delegation, was dispatched around 167/783-84, were listed by Wakīʿ[912]; biographical dictionaries (*ṭabaqāt*) contain some details on these members while others can be gleaned from the positions they then take on the matter of whom to appoint instead of Khālid:

1.*ʿUthmān b. (Abī) al-Rabīʿ al-Thaqafī:* He seems to have left no other traces in the literature than his participation in this delegation. His following intervention against the designation of judicial candidate al-Anṣārī because of his adherence to the legal thought of Abū Ḥanīfa, suggests that he is a scholar representing the Basran legal thought[913] and opposed Abū Ḥanīfa's teaching.

2. *Isḥāq b. Ibrahīm al-Khaṭṭābī:* Nothing is known about him; his family name (*nisba*) supports the assumption that he might have descended from the second caliph, ʿUmar b. al-Khaṭṭāb.[914]

3. *Muḥammad b. ʿAbd Allāh al-Anṣārī:* A scholar and Ḥanafī jurist (*faqīh*) of Basra, he was an adherent of the legal teachings of Ḥanafī scholars Zufar b. Hudhayl who introduced Ḥanafi legal thought to Basra[915], and of Abū Yūsuf, another prominent early Ḥanafī scholar who later became Chief Justice. He wrote a book on charitable endowments (*awqāf*).[916] On one occasion he received the sum of 50,000 dirhams from caliph al-Ma'mūn to distribute the amount among the jurists (*fuqahā'*) of the town, suggesting that he was considered one of the leading (Ḥanafī) jurists of the town.[917] He was later himself appointed *qāḍī* of Basra twice, in 181-192/806-807 and from 198/813 to 202/817-18.[918]

4. *Yusūf b. Khālid al-Samtī*[919]*:* A jurist and supporter of the principle of *ra'y* (discretionary opinion, legal discretion), he was an adherent of Abū Ḥanīfa and the author of Ḥanafī legal works on legal formularies (*shurūṭ*)[920] He was also transmitter of *ḥadīth*, with a reputation of a weak scholar because of his philosophical Muʿtazilite opinions that circulated

[912] Wakīʿ, *Akhbār al-quḍāt*, II, p. 128. Tillier, *Les Cadis* (2009), p. 166.
[913] Wakīʿ, *Akhbār al-quḍāt*, II, p. 131, Tillier, *Les Cadis* (2009), pp. 166, 173, 174.
[914] Al-Samʿānī, *al-Ansāb*, II, p. 380; Tillier, *Les Cadis* (2009), p. 166.
[915] Tsafrir, *The History* (2004), p. 31; Melchert, *The Formation* (1997), p. 41.
[916] ḤajjĪ Khalīfa, *Kashf*, I, p. 21; Tsafrir, *The History* (2004), p. 135, note 186.
[917] Al-Khaṭīb al-Baghdādī, *Tar'īkh Baghdad*, V, p. 409.
[918] On the education of Muḥammad b.ʿAbd Allāh al-Anṣārī, see Wakīʿ, *Akhbār al-quḍāt*, II, p. 151, 157; al-Ṣaymarī, *Akhbār Abī Ḥanīfa*, p. 164; al-Khatīb, *Ta'rīkh Baghdād*, III, p. 25, 28; Ibn Abī l-Wafā', *al-Jawāhir al-muḍiyya*, II, p. 70.
[919] Wakīʿ calls him "Al-Samanī", *Akhbār al-quḍāt*, II, p. 128. Meant is Abū Khālid Yūsuf b. Khālid b. ʿUmayr al-Samtī al-Baṣrī (d. 189/ 805), Al-Mizzī, *Tahdhīb al-kamāl*, XXXII, p. 421; Tillier, *Les Cadis* (2009), p. 166.
[920] Ibn Ḥajar, *Tahdhīb*, XI, p. 360, Tsafrir, *The History* (2004), p. 135, note 186.

predominantly amongst Ḥanafi legal scholars.[921] Some credit him with introducing the *ra'y* principle of legal discretion to Basra,[922] his hometown.[923] His proposal to name a Ḥanafī *qāḍī* instead of Khālid underlines his support for the Ḥanafi legal school.[924]

5. *Yazīd b. ʿAwāna al-Kalbī:* A scholar and transmitter of *ḥadīth*.[925]

6. *Īsa b. Ḥādir al-Bāhilī:* He is not listed in the biographical dictionaries, but cited by al-Jāhiz in al-Bayān wa al-tabyīn and in Kitāb al-ḥayawān; according to ʿAbd al-Salām Hārūn, the editor of these two works, he was undoubtedly a scholar and pre-muʿtazilite adherent of scholar ʿAmr b. ʿ Ubayd. [926] It is unclear whether his theological muʿtazilite leanings made him an adherent of the Ḥanafī legal school, as was frequently the case.[927]

The six-person delegation that presented itself to the caliph was thus constituted of scholars. They all represented the city of Basra but seemed to adhere to different scholarly tendencies of Basra: two jurists seemed to adhere to the doctrines of Ḥanāfī legal thought, one to the local Basran legal thought, while we do not know of the others' legal affiliations. However, the final rejection of a Ḥanafī candidate for the judiciary allows the assumption that the majority of these scholars favoured, or even adhered to, "the local school".[928]

Wakīʿ recounts the events following the delegation's report to the caliph, as the scholars try to find out what the caliph decided and go on to debate whom to nominate instead, once they learn of judge Khālid's removal. It turns out that their school adherence is crucial in recommending a new judge:

The delegation members quarrelled amongst each other and were asked to leave the caliph. One of them said:

[921] On this jurist, see van Ess, *Theologie und Gesellschaft* (1992), II, p. 150-153. The Muʿtazilah is a theological school of thought that originating in the eighth century and which had a wide influence on early Islamic philosophy. One of its prominent features was to attempt to reconcile the disputes which would put reason at odds with revelation. Ḥanafī jurists largely leaned towards Muʿtazilite theology and philosophy, Melchert, *The Formation* (1997), p. 55.
[922] Tsafrir, "Abū Jaʿfar al-Ṭaḥawī" (2013) p. 130, citing Ibn Ḥajar, *Lisān al-Mizān*, I, p.275.
[923] Van Ess, *Theologie und Gesellschaft* (1992), II, p. 151.
[924] Tsafrir, *The History* (2004), p. 167.
[925] Ibn Abī Ḥātim al-Rāzī, *al-Jarḥ wa-l-taʿdīl*, IX, p. 283; Tillier, *Les Cadis* (2009), p. 166.
[926] Al-Jāhiz, *al-Bayān wa al-tabyīn*, I, p. 25, and note 307; idem. *Kitāb al-ḥayawān*, I, p. 337-38; Tillier, *Les Cadis* (2009), p. 166.
[927] On a further case where the philosophical leanings toward the Mu'tazila played a role in adjudication, see this Chapter Three, I.4.c.
[928] Wakīʿ, *Akhbār al-quḍāt*, II, p. 131. Tillier, *Les Cadis* (2009), p. 167.

They [i.e. the members of the delegation] went out, without knowing any way to deal with the subject of Khālid [b. Ṭāliq], and left. Al-Muʿallā[929] left the meeting and they asked him:

- Do you know what is the opinion of the Commander of the Faithful on our man [judge Khālid]?

- You constitute the elite (*ʾuyūn*) of your city, he answered them, and you question me about a fact the Commander of the Faithful hid from you? He will himself reveal you his solution!

- Then Layth, the brother of al-Muʿallā, left the meeting [with the caliph]. They questioned him and he gave them the same answer. Finally al-Faḍl b. al-Rabīʿ[930] went out; they went to see him, and he answered in passing:

- The Commander of the Faithful has revoked him from your [city]. Choose a man whom we will appoint [*qāḍī*] over your [population].

Al-Samtī then took the word and said:

- If he himself wishes it, I advise (*āshartu*) [to designate]: al-Anṣārī.

He is an integer (*ʾafif*) man, honorable (*sharīf*) and a jurist (*faqīh*), explained Yūsuf [al-Samtī].

- He says the truth, he has all these qualities, says [member of the delegation] ʿUthmān b. Abī l-Rabīʿ[931], but his advice (*mashūrah*) is mistaken. This man indeed follows [the teachings of jurist] Abū Ḥanīfa and inclines towards his opinion (*raʾy-hu*). And we have in our city rulings (*aḥkām*) that Abū Ḥanīfa considers null and void, whereas rulings other than these would not suit us. Were our litigants judged by rulings other than ours, [our rulings] would be void and our possessions would be lost.

- They diverted therefore their choice from al-Anṣārī and [caliph] al-Mahdī named ʿUmar b. ʿUthmān al-Taymī [a Mālikī jurist from Medina]. [932]

The positioning of the jurisconsults is instructive on many levels: First, it confirms the first rate access the jurisconsults had to the caliph on judicial affairs. Second, it evidences the jurisconsults' authority in succeeding with the removal of a judge by the caliph. Third, it shows the jurisconsults' authority to nominate a judicial candidate before the caliph. Fourth, it reveals the choice of a judge's law school adherence being crucial for nomination, and eventually for appointment. Fifth, it exposes that behind the support for

[929] He was a client (*mawlā*) of caliph al-Mahdī, and governor of Fārs, Ahwāz, ʿUmān (Oman) and Bahrain in 165/ 781-82. Al- Ṭabarī, *Taʾrīkh*, IV, p. 573; Ibn al-Jawzī, *al-Muntaẓam*, V, p. 332, 364. Tillier, *Les Cadis* (2009), p. 172.

[930] Al-Faḍl b. al-Rabīʿ later became minister (wazīr) of caliphs al-Rashīd and Amīn. He was the son of al-Rabīʿ b. Yūnus (d. 169 or 170/786), chamberlain (*ḥājib)* and then minister of al-Manṣūr, and then again *ḥājib* of caliph al-Mahdī from 163/ 779-80 onwards. Under caliph al-Mahdī, al-Faḍl was still a young man and did not seem to have occupied any official function at the imperial court. See Sourdel, "Al- Faḍl b. al-Rabīʿ", *EI2*, II, p. 749; id., *Le Vizirat ʿabbaside*, I, p. 89 ; Atiya, "Al- Rabīʿ b. Yūnus", *EI 2*, VIII, p. 363. Tillier, *Les Cadis* (2009) p. 173.

[931] On ʿUthmān b. al-Rabīʿ in Wakīʿ, *Akhbār al-quḍāt*, II, p. 128; Tillier, *Les Cadis* (2009), p. 173.

[932] Wakīʿ, *Akhbār al-quḍāt*, II, p. 131. See Ibn Ḥajar, *Tahdhīb al-tahdhīb*, VII, p. 424.

or opposition to a judicial candidate, his law school adherence was indicative for his take on matters of substantial law, in this case, property law.

Indeed, this visit to the caliph reveals the high regard the caliph had for legal scholars, by granting them access to his court. Among the numerous scholars from all over who visited Baghdad, several are reported to have visited the caliphs or are even expressly stated to have been invited or summoned by the caliphs.[933] It is it plausible that, apart from pursuing their scholarly activities in Baghdad, the visiting scholars informed the ruling caliph of developments in the regions they came from. Often, this seems to have resulted in an appointment to judicial and administrative positions.[934] Significantly, given that there was no institutionalized mechanism for the recruitment or removal of official for the judicial bureaucracies[935], or of administrative officials in general, the opinion of scholars visiting the caliph may have mattered considerably—and might even have served as an informal recruitment mechanism, identifying the people of a given city or province who ought to be appointed as judges.[936]

The incident also confirms that jurisconsults had sufficient authority to effect the removal of the judge. The caliph was open to the critique presented to him, and it seems to have been persuasive, since the caliph acted according to the wishes of the jurisconsults and discharged the judge from office. In this way, the jurisconsults, who themselves had no coercive aufhority, could employ their persuasive authority over the caliph to establish a quasi-coercive authority on the judge, achieving his removal.

In this case, the jurisconsults did not succeed in a joint nomination of a new judge. It seems that it was easier to have the old judge removed than to consent on a new judge who would benefit the city, divided as it was between the Basran legal tradition and the increasingly influential Ḥanafī school of law. Possibly because the delegation of jurisconsults did not speak with one voice, reflecting that the city of Basra was not ready

[933] Zaman, *Religion and Politics* (1997), p. 160.
[934] Zaman proposes that the manner in which Ibn Saʿd describes many of such visits to Baghdad and a said scholar's appointment seems to posit a causal link between the two: see, for instance, Ibn Saʿd, *Ṭabaqāt*, VII, p. 323, on Muḥammad b. ʿAbdallāh bʿUlātha: "fa-qadima Baghdād fa-wallāhu al-Mahdī al-qāḍā' bʿAskar al-Mahdi". For other instances, see, ibid., VII, pp. 327, 328, 329, 331, 332. Zaman, *Religion and Politics* (1997), p. 160.
[935] On judicial bureaucracy enhancing authority, see Chapter Four, II.
[936] See Zaman, *Religion and Politics* (1997), p. 160. Zaman also qualifies the early Abbasid caliphate in resembling more like Rome during the Principate, where "emperors relied on a network of private connections to bring leading candidates to their attention", than the Chinese or Ottoman empires with their highly formalized systems of recruiting the administrative elite. See Saller, *Personal Patronage* (2002), p. 205. On the patronage system affecting the authority of scholars, see Chapter Four, III. I.d.

(yet) for a Ḥanafī judge, the caliph chose a new judge adhering to yet another school, the Mālikī school from Medina. Al-Samtī's advice on a judicial candidate was affected by this school orientation, namely pro- Ḥanafī, while ʿUthmān's opposition to this advice came also precisely because of his school adherence, probably pro-Basran. Both agreed on the first judicial candidate al-Anṣārī being integer, honourable and a jurist—all criteria that seemed relevant for the nomination of the judge, also mentioned in the *adab al-qāḍī* genre.[937] Yet, the criterion of law school affiliation turned out to be decisive in both being nominated by one and rejected by the other jurisconsult. So in fact, judicial candidate al-Anṣārī was turned down because he would have likely employed Ḥanafī doctrine, whose spread, encroaching on their own legal tradition, the Basran jurists felt threatened by.[938]

Ḥanafī sources state that Zufar ibn al-Hudhayl introduced Ḥanafī jurisprudence to Basra around 140/757-58.[939] This initially created much friction; thus, judge Sawwār b. ʿAbd Allāh (d. 156/772) is said to have resisted the introduction of Ḥanafī legal methods, initially forbidding Zufar to teach.[940] Sawwār b. ʿAbd Allāh considered the Ḥanafī principle of *raʾy* reprehensible innovation (*bidʿa*), together with ʿUthmān al-Battī, one of the leading jurisprudents of Basra in their time.[941] Meanwhile, Abū Ḥanīfa's legal doctrines attracted certain other scholars—like Muḥammad b. ʿAbd Allāh al-Anṣārī—but they still without doubt represented a minority opinion, leading to the rejection of al-Anṣārī. When al-Anṣārī later (d. 215 / 830) eventually did become judge, it was because the acceptance for Ḥanafī law in the city of Basra had increased, probably also because Ḥanafī law in Basra took up some of the Basran elements. Only when Ḥanafī law started incorporating local law did Ḥanafī jurists increasingly have a chance to become judges and remain so for a substantial time.[942] In the meantime, Ḥanafī jurists had also developed their circles in Basra for a few decades.[943] The appointment of non-Ḥanafī *qāḍīs* in Basra in the last two decades of the second century/ 797-815, which was against the policy of

[937] On the moral-religious criteria for the eligibility of the judge, as discussed in the *adab al-qāḍī* works, see Chapter Two, V.1.a.
[938] Melchert, *The Formation* (1997), p. 41.
[939] Tsafrir, *The History* (2004), p. 31.According to one story, he went to Basra as a *qāḍī* and won its people over to Ḥanafism by the reasonables of his arguments, see Ibn ʿAbd al-Barr, Intiqā', p. 173; Melchert, *The Formation* (1997), p. 41. His name does not appear in *Akhbār al-quḍāt* ("Report of Judges") of Wakīʿ, though, so that for Melchert another story seems plausible: that Zufar went to Basra, joined the circle of ʿUthmān al-Battī (d. 143/760-761), and gradually persuaded his students to take up Ḥanafī jurisprudence; Melchert, *The Formation* (1997), p. 41.
[940] Ibn Ḥajar, *Lisān*, II, p. 477, Melchert, *The Formation* (1997), p. 41.
[941] Melchert, *The Formation* (1997), p. 41. Another example of Sawwār's opposition to the teachings of Abū Ḥanīfa's method is mentioned in Wakīʿ, *Akhbār al-quḍāt*, II, p. 65.
[942] Tillier, *Les Cadis* (2009), p. 177.
[943] Tsafrir, The History (2004), p. 36.

Ḥanafī chief justice Abū Yūsuf, suggests that his policy could not be forced on Basran jurisconsults; conversely, it appears that the development of Ḥanafī circles and of some following of Hanafism in Basra were prerequisites for the appointment of Ḥanafī *qāḍīs*.[944]

The doctrinal opposition to Ḥanafī legal thought in Basra also had a strong materialistic aspect. It risked toppling the principles on which a part of the population had built their material, economic wellbeing.[945] Acceptance of the Ḥanafī legal system in Basra implied changes in the area of property law that would have threatened the possessions of some wealthy Basrans. Therefore, the reason behind the opposition of the majority of the jurists of Basra, and perhaps other places[946], to Hanafi *qāḍīs* was not only their adherence to another legal tradition; it was fear of a concrete judicial change that might affect their property.[947] Differently put, local legal scholars of Basra feared judicial activism of a Ḥanafī judge in private law, defined by *Duncan Kennedy* as the willingness to change or evolve the law in ways that upset existing patterns of economic and social advantage.[948]

This was particularly true concerning the rules of endowments (*waqf*), pointed out later by jurist Hilāl al-Ra'y (d. 245/ 859).[949] Involving material property, endowments were a touchy issue everywhere. A *waqf* (or *ḥubs*) is the allocation of some piece of property to charitable or pious purposes.[950] Most *waqfs* consist of real estate, though anything tangible that has permanency can be turned into *waqf*. This is what makes the *waqf* so sensitive, namely that a *waqf* is established in perpetuity, as an inalienable trust that is also is irrevocable.[951] The person establishing the *waqf* (*wāqif*), the founder of the endowment, loses his ownership in the *waqf* property. The property cannot be alienated either by the former owner or by the administrator of the *waqf*. Every *waqf* must have an ultimate charitable or pious objective, such as support of the poor or of a mosque. However, this objective may be in the future and the *waqf* may be used to establish a fund for the maintenance of the descendants of the founder of the endowment (*wāqif)* who would be designated as beneficiaries, if the founder so desires, until the line dies out. This is why

[944] Tsafrir, *The History* (2004), p. 36.
[945] Tsafrir, *The History* (2004) p. 34.
[946] Tsafrir, *The History* (2004), p. 34.
[947] Tsafrir, *The History* (2004), p. 34.
[948] Kennedy, "Toward an Historical Understanding of Legal Consciousness" (1980), p. 5.
[949] On Hilāl al-Ra'y, see Hennigan, *The Birth of an Institution* (2004), p. 2-4 ; Melchert, *The Formation* (1997), p. 33, 41-43.
[950] Liebesny, *The Law of the Near and Middle East* (1975), p. 226.
[951] Hennigan, *The Birth of an Institution* (2004), p.xiii.

endowments and inheritance rights of descendants are closely related – and often a cause for dispute, as reoccurring cases in this study show.

P. Hennigan specifies three advantages for endowments made by families[952]: one, it was hoped that by transforming property into an endowment, it would make the property immune from disappropriation from unjust rulers. Second, family endowments were used to prevent the revocation of a sale pro or to secure property that was contested. Third, and most frequently, founders created family endowments to retain a measure of control over their real estates that was denied to them under the default rules for inheritance as prescribed in the authoritative texts. Under the rules of Islamic inheritance law (*farā'id*), a person is entitled to make a bequest of one-third of his property, the remaining two-thirds are divided and distributed according to the obligatory Qur'ānic rules- unless the heirs agree to a larger, joint bequest.

Thus, since a *waqf* can be designated for specific beneficiaries, it can be used to avoid the limitations of the Islamic law of inheritance. A *waqf* can also help to avoid the excessive fragmentation of property that Islamic inheritance law can sometimes bring about. For those in possession of real estate, *waqf* then was an attractive option to keep the property united even after the inheritor has deceased, while making sure that his or her descendants can still benefit from the wealth. This was an option the well-off families liked to make use of; numerous lands were indeed immobilised to the advantage of the descendants of their owners and could not be sold.[953] These family endowments guaranteed as an inter-generational wealth-transmission.[954] A *waqf* could thus allow for a strategy to maintain property that would otherwise be denied by the rules of inheritance.[955]

The w*aqf* had several advantages over the bequest: while a bequest can be revoked, there is no right of withdrawal in a *waqf*.[956] And a *waqf* can include those who have not yet come into existence, a bequest is limited solely to those who exist on the day the testator dies.[957]

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[952] Hennigan, *The Birth of an Institution* (2004), p. xiv-xv.
[953] See Cahen, "Réflexions sur le waqf ancien" (1961), p. 47, Tillier, *Les Cadis* (2009), p. 174.
[954] Hennigan, *The Birth of an Institution* (2004), p. xiv.
[955] Pacha, "Le *wakf* est-il une institution religieuse?"(1927), p.398–99, Powers, "The Islamic Inheritance System:
A Socio-Historical Approach" (1990), p. 22; Hennigan, *The Birth of an Institution* (2004), p.xv.
[956] Khaṣṣāf, *Aḥkām al-Awqāf,* p. 248.
[957] Hilal al-Ra'y, Aḥkām al-Waqf, p. 138; Khaṣṣāf, *Aḥkām al-Awqāf, p.* 260, Hennigan, The Birth of an Institution (2004), p. 95.

Significantly for the upcoming cases in this study, Abū Ḥanīfa, who refused any bypassing of the laws of inheritance, endwoments were to be governed by the same principles as the inheritance (*waṣāyā*)[958]: He argued that one third of the incomes could be appointed to the category of beneficiaries as a bequest (see the controversial case of the "house of the elephant"[959]) and, especially, that the bequest should limit the number of the descendants:[960]

In the case of a *waqf* constituted in favor of the family of the founder, only those procreated by the descendent (*makhlūqīn*) at the time of his or her *waqf* could be considered to be beneficiaries. After the moment of their death, incomes are to be returned to the poor and needy.[961]

It is likely that a large number of Basrans would have been deprived of a substantial part of their incomes if such a Ḥanafī rule had been applied. A judge's leaning to a particular school of law thus played a considerable role for the property rights of whole lines of families, and was thus decisive for the economic ordering of a city.

As indicated above, caliph al-Mahdī ended up appointing ʿUmar b. ʿUthmān al-Taymī, Medinan both by origin and by his legal tendencies.[962] Thanks to his modesty and his efforts, the *qāḍī* managed to be accepted by the Basrans.[963] It is not likely that a judge following the Mālikī school of law would have been the choice of the local legal scholars of Basra, who were not particularly favorable to the Medinan legal school, and who did not have particular contacts with the jurists of Medina at that time.[964] This appointment corresponded much more to the legal policy of the first Abbasid caliphs who early favored the Medinan school of law in Baghdad.[965] In the end, the delegation of jurisconsults was therefore not able to bring about a new judge of their preference, failing to assert collective authority vis-à-vis the caliph. Nonetheless, they did send strong signals of authority to the judiciary: The jurisconsults could address the caliph on the removal and the nominations of judges, with their choice being taken into serious consideration, with

[958] Hennigan, *The Birth of an Institution* (2004), pp. 92-106.
[959] The case of the "house of the elephant" involved judicial consultation, this Chapter Three, I.4.
[960] Hennigan, *The Birth of an Institution* (2004), p.xv.
[961] Khaṣṣāf, *Aḥkām al-awqāf*, p. 94. Khaṣṣāf speaks explicitly of the legal opinion of the "jurists of the people of Basra" and how they diverge from the Ḥanafī doctrine on *waqf*, Khaṣṣāf, *Aḥkām al-awqāf*, p. 102. Tillier, *Les Cadis* (2009), p. 174.
[962] Wakīʿ, *Akhbār al-quḍāt*, II, p. 133.
[963] Wakīʿ, *Akhbār al-quḍāt*, II, p. 134. Tillier, *Les Cadis* (2009), p. 177.
[964] Tillier, *Les Cadis* (2009), p. 177.
[965] See also the (initial) preference of the Abbasids for Medinan law that made them turn to jurist Mālik b. Anas for assistance in codifying the laws of the Abbasid empire along "his", the Medinan legal school, Chapter Four, II.3., and III.1.e.

the realistic possibility of their counsel being adopted – even when this time they did not succeed in coming up with a joint judicial candidate.

The Basran example shows that thanks to their consultative role, the legal scholars of the Iraqi regions (*amṣār*) could put forward the candidates for adjudication who corresponded most with their expectations. In the opinion of the consulted scholars, the adherence of the *qāḍī* to a specific legal teaching appeared to be of prime importance. The legal school (*madhhab)* as selection criterion was explicitly put forward by the Basran members of the delegation when caliph al-Mahdī followed the advice of the jurisconsults to remove *qāḍī* Khālid b. Ṭalīq, and was vital in a judge's backing by the jurisconsults.

cc. Second Scholarly Delegation from Basra to *Harūn al-Rashīd*: Nomination of Judge *Muʿadh b. Muʿadh*

In the meantime, the Abbasids increasingly preferred the Ḥanafī school, possibly because of their Ḥanafī chief justice Abū Yūsuf, an eminent Ḥanafī jurist.[966] And so after appointing two Ḥanafī *qāḍīs* without consulting the legal scholars of Basra[967], in 181/797-98 caliph Hārūn al-Rashīd, successor of caliph al-Hadī, turned to a delegation of Basran scholars again, and asked them to present a candidate.[968]

The initial reason of the delegation's visit to Baghdad was not the nomination of a judge, nor even the removal of one. Still, events played out in a quite similar fashion as in the case of Khālid b. Ṭalīq, only more successfully for the Basrans. The scholars, in their quality as trustworthy notables, had been called to the court[969] to serve as witnesses for the authority of an agent (*wakīl*) of the caliph to represent the latter in a legal matter. The matter in question concerned the transaction of a marsh land between the caliph and his minister (*wazīr*) Yaḥya b. Khālid. The case was handled by a Basran judge, *qāḍī* ʿUmar b. Ḥabīb (d. 215/830). Prior to his position in Basra, he had been judge of the Western district of Baghdad around 161/777.[970] As a jurist, he was identified with the principle of

[966] On shifting from Medinan to Ḥanafī preference of Abbasids, see Chapter Four, III.1.e.
[967] *Qāḍī* Al-Makhzūmī and *Qāḍī* ʿUmar b. Ḥabīb, Wakīʿ, *Akhbār al-qudāt*, II, p. 140, p. 142.
[968] When later Basra turned into a city with Hanafī legal dominance, the caliph stopped turning to the local scholars, Tillier, *Les Cadis* (2009), p. 169.
[969] They were called by the caliph himself, or by his minister, *wazīr* Yaḥya b. Khālid, according to another narrative, Wakīʿ, *Akhbār al-quḍāt*, II, p. 145.
[970] Al-Khatīb al-Baghdadi,, *Tarʾīkh Baghdād*, XII, p. 308; XI, p. 196; Tsafrir, *The History* (2004), p. 51, where ʿUmar b. Ḥabīb is listed as a *qāḍī* of the jurisdiction of the Western district of Baghdad (al-Karkh/ al-Sharqiyya).

legal discretion (*ra'y*), but his efforts in the field of *ḥadīth* were much critized; though he is included in the Ḥanafī biographical dictionaries, the sources mention no Ḥanafī teacher.[971] The delegation was put together by ʿUmar b. Ḥabīb himself:

[Caliph] Al-Rashīd wrote [to judge ʿUmar b. Ḥabīb] to send him a group of Basrans, to make them give testimony that he designated an authorised representative in the affair of the marshland. ʿAmr b. Al-Naḍr, Ismāʿīl b. Sudūs, and Ibrahīm b. Ḥabīb b. Al-Shahīd left [for Baghdad]. [972]

As possibly feared by the *qāḍī,* the delegates of legal scholars promptly made use of their encounter with the caliph to complain about him, managed to have him removed and even successfully proposed a successor of the Basran tradition, Muʿādh b. Muʿādh:

- I do not trust ʿAmr b. Al-Naḍr, declared ʿUmar b. Ḥabīb, he always finds an occasion to denigrate me. When he went out in their company [here the text is incomplete].

- Abū Baḥr says according to ʿAmr b. al-Naḍr: We introduced ourselves to [caliph] al-Rashīd and here is the first question which he asked us: What do you say about your *qāḍī*?

- Commander of the Faithful, I answered, he is an incorrigible gambler who is not made for adjudication.

- Be witnesses that I will revoke him, declared [the caliph]. What name do you propose [to replace him]?

- ʿAmr said: I wanted to say "Bishr b. Mufaḍḍāl", but Hammām [b. Saʿīd] was quicker than me and proposed: Muʿādh b. Muʿādh!

That he surpassed me made me angry, but I did not want to contradict him, because if divergences appeared, [the caliph] would leave ʿUmar in office until we would come to an agreement. I therefore kept silent.[973]

It is only with quite some difficulty that the members of the delegation can be reconstructed. Some anecdotal details and scarce prosopographical material allow some hypotheses on the structure of the delegation: [974]

1. ʿAmr b. al-Naḍr was a Basran scholar, a traditionist who eventually became *qāḍī* of the Iraqi city al-Ahwāz in 196/811-812.[975] His scholarly affiliation does not seem clear. Several indications suggest that ʿAmr b. al-Naḍr was heading the delegation; this is not unlikely given the stature he appears to have had: although he had feared the critique of ʿAmr b. al-Naḍr, *qāḍī* ʿUmar b. Ḥabīb designated him to go to the caliph; it seems that his

[971] Melchert, *The Formation* (1997), p. 42.
[972] In an additional version of this account, Wakīʿ also adds the names of ʿAbd al-Raḥmān b. Ḥabīb al-Ṭufāwī and Muḥammad b. Maḥbūb al-Dhabbī. Wakīʿ, *Akhbār al-quḍāt*, II, p. 145.
[973] Wakīʿ, *Akhbār al-quḍāt*, II, pp. 144-145.
[974] Tillier, *Les Cadis* (2009), p. 169.
[975] ʿAmr b. Naḍr Basran traditionist who seems to ave been somewhat renowned during his time, see Ibn *Makūlā, al-Ikmāl*, VII, p. 266 ; Ibn Ḥajar, *Lisān al-mīzān*, IV, p. 377; according Wakīʿ he carried the name "Al-Bazzaz" (merchant of clothes).Wakīʿ, *Akhbār al-quḍāt*, III, p. 302. On the vagueness of his legal adherence see Tsafrir, *The History* (2004), p. 62, Tillier, *Les Cadis* (2009), p. 168-169.

authority was considered high enough within the Basran society that the *qāḍī* could not pretend to ignore him. Also, it is ʿAmr b. al-Naḍr who first spoke to answer the caliph. He also felt offended by the attitude of Hammām jumping in with his answer, which suggests that an implicit understanding of roles had been violated.[976]

2. Ismāʿīl b. Sudūs is a person not well known.[977] His name does not appear in the grand biographical dictionaries. Cited by the chronicler Ṭabarī as a narrator on the subject of the Qur'ānic Sura "people of the caverne" (*aṣḥāb al-kahf*)[978], he seems to have been a specialist of (a particular) Qur'ānic theme.

3. Ibrahīm b. Ḥabīb b. Al-Shahīd was a client (*mawlā*) related to the family of Azd. He was known as a Basran traditionist and was considered trustworthy.[979]

4. It remains unclear who *Hammam b. Saʿīd*—the one who throws in the name of candidate Muʿadh b. Muʿadh—is. He is not listed as a member of the delegation and no further information is to be found on him.

Given the spare information on some of the delegation members, it is difficult to tell their regional and school background. Still, the encounter with the caliph occasioned at least two persons to come up with the candidate of their choice, even if it meant infringing on the hierarchical order of the group. The difference between the two judicial candidates they had in mind is difficult to reconstruct *ex post.* Of the first, Abū Ismāʿīl Bishr b. Mufaḍḍāl, we know that he was a renowned traditionalist scholar from the Basran school (d. 186/802 or 187/203).[980] The same seems true for Muʿādh b. Muʿādh, who ended up being appointed for the second time and stayed in office for a decade (181-191/797-806) [981] (his career, too, was ended by scholarly intervention, as the next case shows). He was from the respected and prominent Basran ʿAnbarī family (*Banū al-ʿAnbar*) whose

[976] Tillier, *Les Cadis* (2009), p. 169.
[977] Al-Ṭabarī, *Ta'rīkh*, I, p. 373.
[978] Al-Ṭabarī, *Ta'rīkh,* I, p. 373; Tillier, *Les Cadis* (2009), p. 169.
[979] The biographers who give some more information on him are al-Bukhārī, *al-Ta'rīkh al-kabīr*, I, p. 281; Ibn Ḥajar, *Tahdhīb al-tahdhīb*, I, p. 98; al-Dhahabī, *Ta'rīkh al-Islam*, years 201-210, p. 37. Al-Jāhiz, *al-Bayān wa-l-tabyīn*, III, p. 277 cites him as a narrator of *akhbār*. He is also mentioned by Ibn Saʿd, *al-Ṭabaqāt al-kubrā*, VII, p. 303) without any further details on his field of scholarship. Nasā'ī considers him trustworthy, Tillier, *Les Cadis* (2009), p. 169.
[980] Ibn Saʿd, *al-Ṭabaqāt al-kubrā*, VII, p. 290; Ibn Qutayba, *al-Maʿārif*, p. 513; Yaḥya b. Maʿīn, *Tarīkh*, IV, p. 237, al-Samʿānī, *al-Ansāb*, III, p. 81; Tillier, *Les Cadis* (2009), p. 169.
[981] Wakīʿ, *Akhbār al-quḍāṭ,* II, p. 147, 154, his first tenure was terminated after four months.

members served the government; the ʿAnbarī scholars also had a leading position in the legal system of Basra.[982]

Thus both candidates belonged to the local Basran fabric of scholars, and were not people who were brought in from outside of the legal local community—unlike Khālid b. Ṭalīq's Medinan successor, ʿUmar b. ʿUthmān al-Taymī. Both must have been familiar with local legal traditions, and could thus not have posed an evident threat to the Basran community, as was the Ḥanafī candidate al-Ansāri in the previous case, who was Basran too but represented the (foreign) Ḥanafī legal thought. With two local Basran candidates embedded in the local school of law, it is difficult to make out different legal tendencies. This is maybe why ʿAmr did not think it was worth sticking to his candidate.

In the eyes of the head of the delegation, the importance of outward unanimity seems to have dominated over his desire to promote his own candidate, and the consultation did not give rise to a debate on the qualities of the ideal judge, as in the case of al-Ansārī. It seems as if a consensus was considered necessary, since this group of scholars had to constitute a unified entity of scholars with no points of divergence to weaken their position.[983] After all, a unified collective of jurisconsults is much more persuasive than a fragmented one. It might be that the scholars feared to have a judge imposed on them by the caliph if they do not speak with one voice—possibly they were aware of the unfortunate outcome of the previous case.[984] Suppressing internal differences, they were able to demonstrate a collective authority towards both the judge and the caliph, come through with their advice and to maintain their position of strength. The jurisconsults assessed, possibly from the previous experience of two different names being mentioned, that their chances of being heard were higher if they spoke with one voice. And, indeed, as only one name was mentioned to the caliph, it was precisely this person who was appointed judge.

This case confirms the quasi-coercive authority of the jurisconsults vis-á-vis the judges. The judges must have known that the authoritative opinion of the scholars had a realistic chance of being listened to and followed. This put the jurisconsults in an asymmetrical, superior position of authority over the judges.

[982] Tsafrir, *The History* (2004), p. 32.
[983] Tillier, *Les Cadis* (2009), p. 170.
[984] Tillier, *Les Cadis* (2009), p. 170-177.

dd. Removing Judge under Influence of "Bad" Jurisconsults

The next case is interesting in that it documents the influence of jurisconsults on the judge's adjudication. Significantly, the jurisconsults' influence is considered by some critics as bad, corrupting the judge. His bad adjudication is considered the jurisconsults' fault.

In 172/788-789, the same Basran *qāḍī* Muʿādh b. Muʿādh in his second tenure had become so unpopular among the legal scholars (fuqahā') and the population of his jurisdiction that they grew more discontent by the day, and had written to the caliph to complain about him.[985] The reasons for the complaints were his long tenure, his old age, weak sight, and significantly, that his adjudication turned bad when he became frail and when was consulted and manipulated by the wrong people, corrupting his adjudication. Those who reproached the judge to be under the influence of "bad" jurisconsults were legally experienced themselves: It were people like Muḥammad b. ʿAbdullāh al-Ansāri (jurist, *faqīh*, of Basra), Muḥammad b. Ḥarb al-Hilālī (whose family, Banu Hilāl, were maternal aunts of the caliph), and 'Umar b. Ḥabīb (former judge) as well as ʿAbdullāh b. Siwār. Crucially, those consulting the judge were scholars who possessed legal knowledge (*shuyūkh julla 'ilman*), so Wakīʿ who confirms that the jurisconsults interfered with adjudication and debated with the parties.[986] The chronicle goes on to present litigants complaining about the jurisconsults writing and dictating judgments, and poets ridiculing the judge for his obvious mistakes (" he cuts the hand of the fornicator and stones to death the thief"). The judge was removed from office by governor of Basra, Muḥammad b. Sulaymān. [987]

In another account, we learn a bit more about the "bad influence" on the judge. The four legal scholars in their delegation trip to the caliph were each asked by the caliph about judge Muʿādh b. Muʿādh.

- Al-Ansārī: It would be better for him and for the Muslims if he were not judge.
- Ibn Ḥarb said: He was as good as you first said. But then he was surrounded by people who corrupted him.
- ʿUmar b. Ḥabīb: Oh caliph, people either praise or loath judges.

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[985] Wakīʿ, *Akhbār al-quḍāt*, II, p. 148, 149, 152.
[986] Muḥammad b. 'Uday b. Abī Amārah al-Numayrī,ʿ Abd-Alraḥmān b. Ḥabīb al-Tafawī, Sulaymān ibn al-Aḥmar (mawla Bahila), Al-Harīth b. Ḥussein, Wakīʿ, *Akhbār al-quḍāt*, II, p. 148.
[987] Al-Khaṭīb, *Ta'rīkh Baghdād*, XIII, p. 132; Ibn al-Jawzī, *al-Muntazam*, V, p. 385; Tillier, *Les Cadis* (2009), p. 246.

- Ibn Siwār was asked what he thought about his paternal cousin: It was the right choice of the caliph, but then his friends' affairs emerged, and weakness of his sight and his age.

- Caliph al-Rashid responds: Weak sight can also occur in young man.

- Ibn Siwār answered: This is right, but we can accept this [weak sight] in anything but adjudication. We cannot accept weak sight in adjudication.

- The caliph: You are right.

The caliph rewarded every member of the delegation (6000 dirham) and they left.[988]

It seems judge Muʿādh' weak sight was decisive for having him removed from office. This way, the delegation members evaded a crucial debate with the caliph about the qualities of the jurisconsults and how they affected the judge's adjudication. Consultation, of course, can also lead to bad judgments – it least in the eyes of the litigants.

ee. Removing Judge *Yaḥyā b. Aktham* for Seducing Young Men

The next case, however, concretely names the reasons for complaints: The locals of Basra accused *qāḍī* Yaḥyā b. Aktham (d. 242) in front of caliph al-Ma' mūn to have seduced young men. In 210/825-826 the caliph decided to remove him from office as judge where he had served for eight years, from 202 until 210.[989] However, this was not yet the end of Yaḥyā b. Aktham's judicial career: Some years later, in 237/851, he was promoted by the caliph as chief justice.[990] However, many years later, a similar scandal is reported to have caused his ultimate removal: caliph al-Mutawakkil withdrew from him the post of chief justice in 240/854-855, after his adventure with two young men had caused a scandal.[991] This must have been the final blow on this integrity, leading to his ultimate removal from office. It thus appears that criticism leading to a removal was not necessarily an obstacle to later reappointment, even promotion.

Whether in this case all complaints came from the local legal community or also from the population at large is unclear. While the type of conduct Yaḥyā b. Aktham was charged with was probably rather a less specific reason for removal, it is generally easier for experts of law to detect what could be considered legal mistakes, or which violations

[988] Wakīʿ, *Akhbār al-quḍāt*, II, p. 152.
[989] Wakīʿ, *Akhbār al-quḍāt*, II, p. 167; III, p. 272, 273; Al-Khaṭīb al-Baghdadi, *Ta'rīkh Baghdād*, XIV, p. 199; Ibn Khallikān, *Wafayāt al-aʿyān*, VI, p. 152 ; Tillier, *Les Cadis* (2009), p. 246.
[990] Wakīʿ, *Akhbār al-quḍāt*, III, p. 300.
[991] Ibn Ḥajar, *Rafʿ al-Iṣr*, p. 461 ; Tillier, *Les Cadis* (2009), p. 247.

of morality and religion would harm the respect for the judiciary, and thus for adjudication. The part of the population who would articulate their complaints, probably the nobility and the political and economic elites, who would be most affected by adjudication would probably also have a word in transporting the complaints to give them even more weight. The sources therefore do not always allow a clear distinction between removals following general (or elite) popular local pressure and particular pressure from local legal scholars. Critique was almost always brought forward by local legal scholars, when they appeared as a delegation before the caliph or governor. Probably the participants of the delegation came *qua* legal scholars, but this did not exclude them also coming as representatives of their city. In some cases, there was an overlap between local scholars and local nobility[992], in others legal scholars were accompanied or sometimes led by some notability of the city. This combination might have been indeed been a strong one: Joining elite authorities, the legal-moral with the political-financial authorities, would in most cases have been an effective way to either threaten the caliph with local uprisings or reassuring him of local stability supported by the local elites.

ff. Basran Delegation of Jurisconsults Nominating Judge *al-Taymī*

A short note confirms that a further visit of a group of delegates from Basra, this time to caliph al-Mutawwakkil, led to the appointment of Ibrahīm b. Muḥammad al-Taymī *qāḍī* of Baṣra (239-250/ 853-864), probably a Ḥanafī scholar.[993] The delegation from Basra was probably comprised of legal scholars[994], in this case presumably all competing for the post of the judge themselves. It remains unclear from the sources though[995] whether they appeared as a collective authority, giving their advice on who best should become the next *qāḍī* of the city, or whether they came to each present themselves to the caliph as suitable judicial candidates, to be examined by the caliph.

The incident shows that judges often were part and parcel of class of legal scholars, often coming from among them, being peers. The relationship, in some cases, transforms with the change of function: when the legal scholar becomes judge, the relationship of

[992] Tillier, *Les Cadis* (2009), p. 248.
[993] Wakīʿ, *Akhbār al-quḍāt*, II, p. 179, 181; with an interruption from 247-248/ 861-862; Tsafrir, *The History* (2004), p. 39.
[994] Tillier, *Les Cadis* (2009), p. 171.
[995] Wakīʿ, *Akhbār al-quḍāt*, II, p. 179.

collegiality, even when competiting for the better school of law or the better legal argument, ends. The non-state actor and the state actor encounter each other with their different competences, the judge henceforth equipped with coercive authority, but closely monitored by his erstwhile peers lest he make a mistake that warrants removal (and replacement); one factor that may motivate him to call upon them regularly for advice.

gg. Jurisconsults Failing to Have Judge *Abū Shayba* Removed in Wasit

Local scholars were not always successful in asserting their authority in removing an unsuitable or incompetent judge. In the following case, their attempt to come forward with complaints about the judge left the caliph unimpressed: instead of firing the judge, he apparently promoted him to chief justice.

In the following incident in the Iraqi city of Wasit, a group of local scholars requested that *qāḍī* Abū Shayba Ibrāhīm b.ʿ Uthmān be removed from office by caliph al-Mahdī, accusing him of inappropriate behavior as a judge and neglecting his job.[996]

There was in Wāsiṭ a man called Abū al-Layth, he later left to settle in Basra. He was not one of those who had complained about q*āḍī* Abū Shayba.

They [the delegation] presented themselves in front of caliph al-Mahdī and Abū al-Layth spoke [negatively] of [judge] Abū Shayba. He [Abū al-Layth] said in particular:

- He leaves [every morning] to attend his occupation, sells (some) milk still foaming; he misses parts of the prayer and does not redo them!

Abū Shayba indeed had cows that were milked and whose milk was sold.

-ʿUmar al-Qaṣīr rejected the words of Abū al-Layth. He was with [the supporters of Abū al-Layth] Abū Maʿmar, a Syrian whom came to live in Basra, [but] ʿUmar al-in Qaṣīr confirmed:

- Commander of the Faithful! This man drinks and gets intoxicated!

And he mentioned things which made al-Mahdī laugh.

The man who conspired against Abū Shayba was called ʿAlī b. ʿĀṣim.[997]

The report continues by recounting the previous events in Wasit (apparently related to Basran governor Ṣāliḥ b. Dāwūd[998]): The *qāḍī* had gone to see the caliph together with a number of people, of which only the name of local Wasiti *ḥadīth* scholar and traditionist

[996] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 309- 310.
[997] Tillier suggest that it could possibly be ʿAlī b.ʿAṣīm (d. 201/ 816-8179) mentioned by Baḥshal, Ta'rīkh Wāṣiṭ, p. 145, Tillier, *Les Cadis* (2009), p. 244.
[998] Governor of Basra and its surroundings from 164/780-81 until 166/782-83. Al-Ṭabarī, *Ta'rīkh*, IV, p. 570; Khalīfa b. Khayyāt, *Ta'rīkh*, p. 291. Tillier, *Les Cadis* (2009), p. 245.

Muḥammad b. Yazīd al-Wāsitī (d. 188/804 or 191/806-807) was recorded.[999] During this visit caliph al-Mahdī had augmented the *qāḍī's* salary and gave him presents. But when he had demanded to know the names of the others, *qāḍī* Abū Shabaya had refused to provide them. Consequently, his companions turned against him, probably because they has thus missed a chance to receive presents or other forms of bonuses from the caliph themselves. The judge's harshest critic ʿAlī b. ʿĀṣim encouraged people to complain about the *qāḍī*. In response, the caliph sent after the judge and a summoned group of scholars to give witness on the *qāḍī's* behaviour. The scholars, however, were split on the judge; one half sang his praise, the other complained about him. The caliph removed the *qāḍī* from office, but only to appoint him chief justice.

The entire story shows that local (legal) scholars attempted to have judge Abū Shayba removed from office because they were discontent with the way that he treated them. They attacked his professional as well as his moral-religious integrity, seeking to bring him into disrespute, and to facilitate his removal. The caliph did not give in to the attempts of discrediting the judge: if we are to believe the end of this report, the attempted removal from office as *qāḍī* turned into a promotion, as Abū Shayba was appointed *qāḍī al-quḍāt,* chief justice.[1000]

While the nomination, maintenance or removal of a judge depended to a great extent on the pressures the authority of local jurisconsults could bring about, in this case, their authority did not achieve the desired aim. This, of course, is the nature of persuasive authority: there is no certainty of the implementation of advice.

By contrast, for the authority of the jurisconsult vis-à-vis the judge it is not necessary that the caliph follows the jurisconsult's advice in each and every case. Instead, for the judge to have to reckon with the jurisconsult, it is enough that he knows that a) the jurisconsult will collect information on or against the judge (or possibly exaggerate them or make them up) and thus monitor and control the judge's adjudication and activities[1001]; b) that the jurisconsult's information would have the judge be summoned before the caliph (or the political authorities) to be confronted with the complaints and questioned; and that c)

[999] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 310; On Abū Saʿīd Muḥammad b. Yazīd al- Wāsitī, see Al-Khaṭīb, *Ta'rīkh Baghdād*, III, p. 371; Tillier, *Les Cadis* (2009), p. 244.

[1000] This title seems documented and evidenced only from the later reign of caliph al-Rashīd onwards, who first awarded it to Abū Yūsuf. Whether this anachronism has any significance remains unclear. Tillier, *Les Cadis* (2009), p. 245.

[1001] Another important figure to collect information on the judge was the postal officer. Based on the postal reports to the caliphs, judges could be removed from office. The postal service was part of the centralization policy of the caliphate see Chapter Four I.1.

there was a real chance of the jurisconsult persuading the caliph to remove the judge from office. These measures put the jurisconsult factually in a superior position over the judge: The jurisconsults can direct their persuasive authority on the caliph to have quasi-coercive authority over the judge.

ii. Successful Removal of Judges in *Wasīṭ*

The scholars were more successful with judge Abū Shayba's successor in Wāsiṭ, Iraq, Salama al-Aḥmar, twenty years into his office. Under caliph al-Rashīd, so Wakīʿ documents, a delegation composed of Khālid b. ʿAbd Allāh al-Ṭaḥḥān, local scholar and traditionist from Wāsiṭ[1002]; Hushaym [b. Bashīr][1003], a local scholar and traditionist from Wāsiṭ who was engaged in doctrinal legal debates; Muḥammad b. Yazīd; the judge's former secretary[1004] Yazīd b. Harūn; and Abān al-Ṭaḥḥān, went to Baghdad to complain about the *qāḍī*. Just as in the previous case, the caliph summoned judge Salama al-Aḥmar to confront him with his critics, and then removed him from office.[1005] This case, however, ends with the judge getting removed from office and not get promoted in any other way.[1006] The judicial chronicles remain silent though on the reasons for complaint.

Knowing that the jurisconsults could instigate a meeting before the caliph where the judge was to be confronted with uneasy questions, and which in many, though not all cases, led to his removal, must have created a relationship of asymmetry between judge and jurisconsult. The jurisconsult, though without direct competency to remove the judge, could use his persuasive authority (alone or with others) on the caliph to have the judge dismissed, based on questions of law or his behaviour as judge.

[1002] His full name is Abū al-Haytham Khālid b. ʿAbd al-Ṭaḥḥan al-Wāsitī, see Ibn Saʿd, *al-Ṭabaqāt al-kubrā*, VII, p. 313; al-Samʿānī, *al-Anṣāb*, IV, p. 51; Tillier, *Les Cadis* (2009), p. 246.
[1003] Hushaym b. Bashīr, scholar and traditionist of Wāṣit (died in Baghdad in 183/ 799-800). He is said to have participated in the sessions discussing doctrinal aspects of jurisprudence with judge Abū Shayba, see al-Dhahabī, *Siyar a'lām al-nubalā'*, VIII, p. 289. Ibn Saʿd, *al-Ṭabaqāt al-kubrā*, VII, p. 313; Ibn Qutayba, *al- Ma'ārif*, p. 287; Ibn Ḥajar, *Tahdīb al-tahdhīb*, XI, p. 53; Tillier, *Les Cadis* (2009), p. 245.
[1004] Wakīʿ, *Akhbār al-quḍāt*, III, p. 309; al-Samʿānī, *al-Ansāb*, IV, p. 140; Tillier, *Les Cadis* (2009), p. 246.
[1005] Wakīʿ, *Akhbār al-quḍāt*, III, p. 312. On biographical information on judge Salama al-Aḥmar see al-Khatīb, *Ta'rīkh Baghdad*, IX, p. 132: Ibn Saʿd, *al-Ṭabaqāt al-kubrā*, VI, p. 383. Tillier, *Les Cadis* (2009), p.246.
[1006] Wakīʿ, *Akhbār al-quḍāt*, III, p. 312.

jj. Jurisconsults affecting Voluntary Resignation of Judge *Al-Ḥassan b. Ziyād*

The persuasiveness of the jurisconsult's authority went so far that the mere anticipation of the jurisconsults could affect the judge's actions, leading to voluntary resignations of *qāḍīs*[1007], thus sparing the judge from being dragged by a delegation of jurisconsults before the caliph and before publically being examined and in some cases having this reputation damaged.

Al-Ḥassan b. Ziyād al-Lu'lu'ī, Ḥanafī *qāḍī* of the Iraqi city of Kufa during the reign of caliph al-Amīn (r. 193-198/ 809-813), was one of the first *qāḍīs* to demand his own resignation from office. This resignation is interesting as was a reaction to jurisconsults' critiquing the judge. As a disciple of Abū Ḥanīfa and companion of Abū Yūsuf and of Zufar[1008], *qāḍī* al-Ḥasan b. Ziyād is known as a preeminent scholar, interested in ḥadīth studies and also a supporter of legal reasoning and discretion (*ra'y*).[1009] He is documented to have written several works of jurisprudence (*fiqh*), all lost, one of which an *adab al-qāḍī* treatise.[1010] In spite of this impressive legal knowledge, al-Ḥasan b. Ziyād acquired the reputation of a bad practician, who according to annalist al-Khaṭīb, was not made for adjudication and suffered from black-outs: "When he assembled to dispense justice, [God] did not give him assistance, so he had to ask his companions about the appropriate judgement! Then, when he rose from the audience, all his knowledge returned to his memory."[1011] Tired of reproaches which were addressed to him by his scholarly peers, the *qāḍī* ended up asking for his removal from office and so found the peace of his soul.[1012] Maybe the *qāḍī* was convinced of himself that he was a better jurist than judge, or maybe the pressure of his extrajudicial colleagues critically monitoring and commenting on his adjudication was too high a price for him to pay to remain in office. The report leaves no doubt that the judge's decision was made, in the final analysis, facing the pressure of other scholars.[1013]

[1007] There is a further example in Egypt of a *qāḍī's* willingness to voluntary resign because of the reproaches of the jurisconsult, see jurisconsult Layth b. Sa'd reproaching *qāḍī* Isma'īl b. al- Yasa', see below, Chapter Three, I.2.b.aa.
[1008] Ibn al-Nadīm, *al-Fihrist*, p. 346; Ibn al-Jawzī, *al-Muntaẓam*, VI, p. 135; Ibn Quṭlubūghā, *Tāj al-tarājim*, p. 22; Tillier, *Les Cadis* (2009), p. 253.
[1009] Al-Khaṭīb, *Ta'rīh Baghdād*, VII, p. 325. See also Ibn Abī al-Wafā', *al-Jawāhir al-muḍiyya*, I, p. 93. Tillier, *Les Cadis* (2009), p. 253.
[1010] Ibn al-Nadīm, *al-Fihrist*, p. 346.
[1011] Al-Khaṭīb, *Ta'rīkh al-Baghdād*, VII, p. 325.
[1012] Al-Khaṭīb, *Ta'rīkh al-Baghdād*, VII, p. 325.
[1013] See Tillier, *Les Cadis* (2009), p. 253.

How "voluntary" was this judge's action? Could he well have acted in anticipation of the quasi-coercive authority, or threat the jurisconsults have structurally been able to excert? According to Legal Realist *Robert Hale,* who majorly contributed to the understanding of coercion in private law, there is a hidden element of coercion in apparently voluntary arrangements.[1014] In his analysis, *Hale* emphasized the need to deduce action from sociological context rather than from legal principles. Taking this into account, one would have to clarify that "to see them [the jurisconsults] simply "exercising their rights" [to critique the actions of the judge] would obscure the element of coercion that stands behind their" function.[1015] The jurisconsults did not take a passive stand towards his adjudication. Their presence and their reiterated criticism were an "active" threat, as *Hale* would have qualified it.[1016]

The jurisconsults' quasi-coercive authority was effective enough, in this case, to make the judge ask for his resignation before they could even start explicitly threatening him with reporting his lapses to the caliph, and thereby instigating a procedure that could have led to his removal. Their mere disapproval of his faulty adjudication was enough for him to resign; they did not need to operationalize their quasi-coercive authority by reporting to the caliph, or threatening to do so, the wrongdoings of the judge.

kk. Jurisconsult *Ibn Ḥanbal* vs. Judicial Candidate *Ibn Shayba* as "Innovator"

It did not always need a collegium of jurisconsults to make their voices heard. The authority of the single jurisconsult, especially when renowned, also played a role in the (un-)making of the judiciary.[1017] As a matter of fact, famous jurist Aḥmad b. Ḥanbal seems to have been invited by caliph al-Mutawwakkil (r. 232-246/847-861) to assess some candidates for the judicature. [1018] ʿAbd al-Raḥmān ibn Yaḥyā ibn Khāqān, brother of the minister (*wazīr*), asked Aḥmad ibn Ḥanbal in the course of reviewing a number of candidates to the judgeship. When he asked him about Yaʿqūb ibn Shayba (d. 262/ 875-

[1014] Hale, "Coercion" (2006), p. 97-98; Kennedy, *The Canon* (2006), p. 88. Hale prominently worked on the state's coercive force in private law. He pointed out how the private field was mistakenly taken for the zone of individual autonomy (free of state coercion) and public law constructed as the only field of state coercion. What I am concerned with here is Hale's central theme of the hidden element of coercion in apparently voluntary arrangements. For an appraisal of Hale's work, see Kennedy, *The Canon* (2006), p. 86-92, especially p. 88.
[1015] Hale, "Coercion" (2006), p. 96.
[1016] Hale, "Coercion" (2006), p. 96.
[1017] See also the publically expressed critique of legal scholar Abū Ḥanīfa regarding adjudication of Ibn Abī Layla for another example of a single, renowned voice critiquing the judiciary, see Chapter Three, I.1.c.
[1018] Melchert, *The Formation* (1997), p. 170; Tillier, *Les Cadis* (2009), p. 172.

876), a Basran who had studied and adopted the Mālikī law, Aḥmad ibn Ḥanbal rejected Yaʿqūb as "an innovator, adherent of fancies."[1019] His innovation concerned the touchy subject of property law, endowments (*waqf*). And he refused to say, like his Mālikī teacher and other prominent Mālikīs, whether the Qur'ān was created or not.[1020] Ibn Ḥanbal's remarks had hit a critical point: The dividing lines between the legal schools went beyond legal disputes and agreed with those between theological schools. The Ḥanafīs were largely connected with the (official) doctrine of the created Qur'ān, and the Mālikī and Shāfiʿīs with the opposite view.[1021] So next to a substantial law related question of how to legally judge endowments, Ibn Ḥanbāl also based his advice on the grand theological dispute of his time, the createdness of the Qur'ān.[1022]

b. Abbasid Province: Egypt

The province of Egypt sheds light on how the relationship between judge, appointed by the caliph, to the jurisconsult, local scholar, worked in a centralized judicial system. Egypt was not a periphery as it was too wealthy to be called periphery, yet its political importance for the Empire lagged behind its economic significance: its agricultural wealth and thriving textile industry made it one of the largest contributors to the budget of the caliphate.[1023] This might explain why there was interest in documenting the judicial ongoings of Egypt, and to appoint judges that would dispense justice in a way that kept its people satisfied and not prompt rebellion against Abbasid rule and their centralized administration of justice.

Unlike in Iraq, where the Ḥanafī school was increasingly spreading despite some resistance from local legal traditions such as in Basra, it was largely the Mālikī doctrine that prevailed in Egypt during the second/eighth and third/ninth century.[1024] In fact, second/eighth century Egyptian legal scholars rarely travelled to Iraq in pursuit of Ḥanafī knowledge, yet they did travel to Medina to study law under Mālik.[1025] Egypt even

[1019] Al-Khatib al-Baghdadī, *Tā'rīkh Baghdād*, XIV, p. 282; Melchert, *The Formation* (1997), p. 170.
[1020] Al-Khatib al-Baghdadī, *Tā'rīkh Baghdād*, XIV, p. 282; Melchert, *The Formation* (1997), p. 170.
[1021] Kindī, *Kitāb al-Wulāh*, p. 469; Tsafrir, *The History* (2004), p. 168, note 56.
[1022] In 218/833, sensing that the dogmatic authority of the caliphate was threatened by the increasing power of "people of *ḥadīth*" (*ahl al-ḥadīth)*, caliph al-Maʿmūn instituted a "test" (*miḥna*) intended to examine the position of the most important jurists and traditionists of the empire vis-a-vis the doctrine of the creation of the Qur'ān defended by number of theologians.
[1023] Kennedy, *The Early Abbasid Caliphate* (1981), p. 25.
[1024] Maqrīzī, *Khiṭat*, II, p. 334; Schacht, *Origins* (1950), p. 9; Tsafrir, *The History* (2004), p. 95.
[1025] Halm, *Ausbreitung* (1974), p. 236; Tsafrir, *The History* (2004), p. 96.

became the center of Mālikī studies after the eponym of the school, the Medinan jurist Mālik b. Anas, passed away. The chronicles make it clear that independent scholars enjoyed high status and popularity among the Egyptian population and circles of learning and teaching - a popularity they could use also towards their influence on judges and the caliph.

The Abbasid preference for Ḥanafī judges from Iraq caused similar friction as in Basra, as they introduced doctrinal innovations that were entirely unprecedented in Egypt, threatening to upset the existing economic order, and were bold enough to challenge the social and moral standards of the elite. For *N. Tsafrir*, the Egyptian-Mālikī community had to deal with (too) many changes at a time: "Within a short period, then, three changes were introduced in Egypt: the *qāḍīs* started to be (at least in part) Ḥanafīs, these Ḥanafīs were from Iraq, and they were appointed by the caliphs."[1026] This led to the two following requests for removal of Ḥanafī judges; in the other instances discussed below, Egyptian jurists and nobility successfully asserted their interest in having local, Māliki judges appointed.

aa. Egyptian Jurist *Layth b. Saʿd* Requesting Dismissal of *Iraqi-Ḥanafī qāḍī Ismaʿīl b. al- Yasaʿ*

The following case was a conflict between the renowed Mālikī jurist Layth b. Saʿd and the Ḥanafī judge Ismaʿīl b. al- Yasaʿ over different takes on property rights—a recurring source of conflict for Ḥanafī judges.

Ismaʿīl b. Yasāʿ was the first Iraqi *qāḍī* of Egypt and also its first Ḥanafī *qāḍī*.[1027] The famous jurist Layth b. Saʿd (d. 175/791) studied under Mālik while asserting his independence from him.[1028] He was considered one of the most influential scholars and leading jurist of his age in Egypt.[1029] He is said to have been "alone in his time to give *fatwās* in Egypt,"[1030] and considered a trustworthy jurist (*faqīh*) who would lead the Friday prayer.[1031] In the following incident, he represented the dissatisfied Egyptian

[1026] Tsafrir, *The History* (2004), p. 162, note 41.
[1027] Kindī, *Kitāb al-Wulāh*, p. 372; See also Tsafrir, *The History* (2004), p. 96
[1028] Merad, "Al-Layth b. Saʿd", Encyclopedia of Islam (2), p. 712.
[1029] See also Zaman, *Religion and Politics* (1997), p. 53, 150.
[1030] "…wa kāna qad istaqalla bi'l fatwā fī zamānihi bi-Miṣr." Ibn Saʿd, *al-Ṭabaqāt*, VII, p. 517; Zaman, *Religion and Politics* (1997), p. 150.
[1031] Kindī, *Kitāb al-Wulāh*, p. 372.

community in its effort to bring about the dismissal of judge Ismāʿīl b. al-Yasaʿ.[1032] It was probably also due to the recognition and patronage accorded to Layth b. Saʿd by three successive caliphs that he was able to exert his influence on and against the *qāḍī*[1033], as the following case shows.

Layth b. Saʿd goes to *qāḍi* Ismaʿīl and reproaches him for not protecting the property of Muslims in support of endowments, following the uninterrupted practice of the Prophet, the four righteous caliphs, Ṭalḥa and Zubayr.

Layth then went on to write to caliph al-Mahdī that Ismaʿīl b. Yasaʿ declared endowments to be invalid. When the letter of dismissal from caliph al- Mahdi was read out to Ismaʿīl by a reader, Ismaʿīl said: "there was no need to write to the caliph. If you wanted me to go, I would have also gone without the order of the Sultan."[1034]

The judge must have indeed pushed his Ḥanafī doctrines on the Egyptians. He is said to have introduced the Ḥanafī school of law (*madhhab)* to the people of Egypt, who had not heard of it before. As *qāḍī*, he is recorded to have to nullified endowments (*waqf*, or *aḥbās*) which disturbed the Egyptians as unprecedented, as the Egyptian author Ibn Yūnus (d. 347/958) reports: "He [Ismāʿīl] followed the doctrine of Abū Ḥanīfa (*qawl Abū Ḥanīfa*), which was unknown to the Egyptians, and his doctrine called for the annulment of the religious endowments (*aḥbās*), and this was hard for the Egyptians to bear."[1035] The doctrinal friction this causes is phrased even more clearly by jurist Layth in a further report:

Layth had written to the caliph: You have appointed for us a man who weakens the Sunna of the Prophet (Peace be Upon Him) amongst us. We had not weakened our commitment towards him in [paying him] every dinar and dirham [of his salary] and remained good. So al-Mahdi wrote his dismissal.[1036]

As the examples from Basra, this incident demonstrates that different law school adherences of judge and jurisconsult can cause friction; that not only doctrinal, but als material issues are at stake; and that such issues may motivate the judge to employ his quasi-coercive authority over the judge by requesting the caliph to remove the judge from office.

[1032] Kindī, *Kitāb al-Wulāh*, pp. 371-173.
[1033] See also on scholarly authority as affected by caliphal patronage, Chapter Four, III.1.d.
[1034] Kindī, *Kitāb al-Wulāh*, p. 372; the report runs from pp. 371-373. See also Khoury, *ʿAbd Allāh ibn Lahīʿa* (1986), p. 176-178.
[1035] Maqrīzī, *Khiṭāt*, II, p. 334; translated slightly differently by Goldziher, *The Ẓāhirīs* (1971), p. 183; see also Juynboll, *Muslim Tradition* (1983), p. 80; Tsafrir, *The History* (2004), p. 165, note 17.
[1036] Kindī, *Kitāb al-Wulāh*, p. 372.

Similar to cases of friction in Iraq, what the jurisconsult fears is judicial activism that might "change or evolve the law in ways that upset existing patterns of economic and social advantage."[1037] The Ḥanafī judge is removed for upsetting the status quo of wealthy Egyptians. This activism, the jurisconsult argues, violates authoritative texts, precedent as laid down by the Prophet and continued by his companions and four righteous caliphs. Layth b. Saʿd thereby refers to the same fear that caused Shāfiʿī to urge for judicial consultation: that the judge might violate or substitute the law of the authoritative texts. [1038] "Weakening the Sunna of the Prophet" is a grave accusation, both towards the judge who (mis-)applied the law and the caliph who appointed the judge. The attack goes beyond the mere disagreement of different interpretations of authoritative texts.[1039] Taking this religiously based argument at face value, there is not much of leeway for the caliph to act. Even if the caliph did not consider the judge's actions of nullifying local endowments as weaking the Sunna, the statement made it clear that legal community and the affected population of Egypt would not silently accept a judge who would upset their economic order and whose judgments they considered incompatible with religious fundamentals.

In another report Layth is less confrontational, and argues only that the judgments were unfamiliar to the Egyptian community:

Layth wrote to al-Mahdi: We did not deny him anything, or objected to anything he said (*nunkir*) except for that he issued verdicts we were not familiar with.[1040]

As in the last report cited, he indicates that "they"—possibly the legal and political communities—were ready to grant the judge the authority he merited as a judge, denying him neither the respect for his *qāḍī* office or his person, nor his payment, and that they did not disobey him or publicly attack his reputation. Yet, this was no longer warranted as the Ḥanafī judge was going too far, issuing judgments that were disconnected from the reality and the economic interests of the Egyptians.

As a result, the caliph was persuaded by the complaints and wishes of the jurisconsult and dismissed *qāḍī* Ismāʿīl b. al- Yasaʿ in 167/783 after he stayed in office for three years and replaced him with the senior Egyptian *qāḍī* of Hadramī (south Arab) origin,

[1037] Kennedy, "Toward an Historical Understanding of Legal Consciousness" (1980), p. 5.
[1038] On Shāfiʿīs fear of judicial activism, i.e. violating or substituting authoritative legal texts with subjective elements, see Chapter Two V.2.b. bb. (2.)
[1039] On the religio-legal principle to accept multiple possible legal interpretations, see Chapter Two, II.1.
[1040] Kindī, *Kitāb al-Wulāh*, p. 373.

Ghawth b. Sulaymān.[1041] The caliph thus chose to appoint a judge of local background to please the Egyptian legal community.

Kindī and Ibn Ḥajar also documented further possible reasons for Ismāʿīl's dismissal.[1042] According to their additional reports, the governor of Egpyt (*amīr misr*) and the postal officer (*ṣāḥib al-barīd*) requested from the *qāḍī* a particular ruling (the content of which is not documented) which he rejected. The *qāḍi* was made to eat a fish after which he became paralysed[1043]-the lack of physical integrity was a sufficient reason to be removed from the judicial office.[1044] In yet another report, it remains unclear whether caliph al-Mahdī dismissed him because of a position the judge took on homosexuality.[1045] Whether these additional problems taken together with the question of endowments or either of the stories can be considered to be decisive is unclear. But as the question of endowments (*aḥbās*) had a larger structural effect on the material wealth of the city, and was a recurring problem of Ḥanafī judges in Egypt for a long time, it might have been the stronger case to request the *qāḍī's* removal.

bb. *Ḥanafī* Judge Criticized by Egyptian Jurisconsults for Introducing Legal "Innovations"

The second Ḥanafī *qāḍī*, Muḥammad b. Masrūq al-Kindī (in office 177-184/793-800), was also disliked by the legal community of Egypt and had many confrontations with them.[1046] The situation was intensified by the fact that many innovations were introduced in Egypt by Ḥanafī *qāḍīs*. At least three such innovations are ascribed to the Ḥanafī *qāḍī* Muḥammad b. Masrūq al-Kindī alone. [1047]

The first critique was related to the laws of testimony. According to one account, *qāḍī* Masrūq refused to accept the testimony of one of the nobilities, regarded in high esteem by preceeding Egyptian judges Ghawth and al-Mufaḍḍal and other judges, for his attendance of evening parties with frivolous songs. This caused a cooling of the relationship between him and some of the Egyptian nobility.[1048] But in particular this

[1041] Kindī, *Kitāb al-Wulāh*, p. 373.
[1042] Kindī, *Kitāb al-Wulāh*, pp. 371-373; Ibn Ḥajar, *Raf' al-Isr*, pp. 167-168 in Kindī, *Kitāb al-Wulāh*, p. 371-373.
[1043] Kindī, *Kitāb al-Wulāh*, p. 373.
[1044] On physical integrity as a criteria of eligibility as judge, see Chapter Two, V.1.a.
[1045] Kindī, *Kitāb al-Wulāh*, p. 373.
[1046] Kindī, *Kitāb al-Wulāh*, pp. 390-392.
[1047] Kindī, *Kitāb al-Wulāh*, p. 388-392; Tsafrir, *The History* (2004), p. 168, note 58.
[1048] Ibn Ḥajar, *Raf' al-Isr*, p. 127, in Kindī, *Kitāb al-Wulāh*, p. 388.

changed the laws of testimony, of who could be considered a credible witness at court. *Qāḍī* Masrūq had thereby changed the social patterns of the city: He had dared to disrupt the local fabric and established hierarchy of the community—something that would be much easier for an outsider from Kufa (Iraq) who was not part of a local constituency.[1049]

The second change concerned the money the judge as a trustee had to administer and guard, the property of orphans, endowments, and absentees. He was accused of embezzling the money: Instead of placing the property within the financial welfare institution (*bayt al-māl*) as a protective means, as has been the convention from the times of caliphs- a-Manṣūr to al-Rashīd, q*āḍī* Masrūq transferred the money right to caliph Harūn. The people of Egypt took it very badly and accused him of taking all the money to the treasury of caliph Harūn.[1050] This innovation, and the friction it generated, concerned property law, a typical theme that divided Ḥanafī judges from Mālikī local legal scholars in Egypt. The locals accused the *qāḍī* of dishonestly misappropriating money that was entrusted to him *qua qāḍī* and whose task it was to safeguard. As the monies of orphans, endowments and absentees are religiously sanctioned, such an attack was twofold: one, it targeted the integrity of the judge since the protection of such trusteeships is part of the judge's official tasks.[1051] Also, the protection of property of orphans, endowments, and absentees is Islamically endorsed and belongs to the most moral ones, and any violation would be religiously considered grave.

The third innovation concerned Christian litigation parties. While all other previous judges held court session for Christians at the doorsteps of the mosque, *qāḍī* Masrūq was the first to have them enter the mosque to solve their judicial affairs. While the account goes on to record that there was no objection to this new rule established by Masrūq, the narrator Yaḥja b. ʿAbd Allāh b. Bukayr did end by saying that Masrūq was nevertheless considered arrogant. [1052]

[1049] Kindī, *Kitāb al-Wulāh*, p. 389.
[1050] Ibn Ḥajar, *Raf' al-Isr*, p. 165 in Kindī, *Kitāb al-Wulāh*, p. 390. "The property of the orphans and the pious foundations (*awqāf*) and of the absentees used to be sent to treasury since the times of al-Manṣūr until the times of al-Rashīd. When al-Masrūq became judge [in Egypt] he was not lavish [with the money of the treasury] on the people of Egypt but they did not thank him and they started to speak badly about him and issued rumours that he wanted to take what is in the treasury to [caliph] Harūn."
[1051] On the non-litigious tasks of judges, see Chapter Four, I.2.aa. (2.).
[1052] Ibn Ḥajar, *Raf' al-Isr*, p. 165b in Kindī, *Kitāb al-Wulāh*, pp. 390-391.

Despite being so disliked by the local community, however, Masrūq remained in office for seven years, and was removed without any particular indications in 184.[1053]

Innovations were also introduced by Mālikī judges who represent local legal thought[1054], yet they stirred more of a debate when introduced and justified within the line of foreign Ḥanafī legal thought. It seems that the Egyptian jurisconsults could pose enough problems to incoming judges they did not approve of, despite or because these judges were approved of by the central Abbasid power. The line of confrontation went along doctrine between the Ḥanafīs (judges) and the Mālikis (jurisconsults). The confrontation also went along territorial lines, the Ḥanafī *qāḍīs* largely coming from Iraq to Egypt. That is to say that Ḥanafī qāḍīs were not from among the local fabric, neither the fabric of jurisconsults nor that of the population. Egyptians, as *N. Tsafrir* has put it, "were not happy to be under the authority of foreigners."[1055] Only when the legal scholars gradually incorporated Ḥanafī legal thought into Egyptian learning circles, did the confrontation between Ḥanafī judges and the local community of jurisconsults subside,[1056] and friction on questions of law and custom decreased. In parallel, reports of jurisconsults complaining about judges and exerting their influence on having them removed decreased too.

cc. Egyptian Delegation in Baghdad Getting the Judge They Wish for: *Ibn Lahīʿa*

The subsequent incident shows how an Egyptian delegation to the caliph, partly consisting of legal scholars, insists on having a judge from amongst them, i.e. from Egypt, instead of one foreign to Egypt, its laws and local customs, and that the caliph is willing to grant them so:

After *qāḍī* of Egypt al-Khuzayma died in 154/771, caliph Abī Jaʿfar al-Mansūr announced to the Egyptian delegation [of which four names are mentioned, one among them a previous judge and another a renowned legal scholar[1057] to Baghdad:

- We have chosen a judge for the people of Egypt.

ʿAbdallah b. ʿAbd al-Raḥmān b. Muʿāwiya b. Ḥudaj (d. 155/771) from the Egyptian delegation said:

[1053] Ibn Ḥajar, *Raf' al-Isr*, p. 176b in Kindī, *Kitāb al-Wulāh*, p. 392.
[1054] Tsafrir, *The History* (2004), p. 168, note 58.
[1055] Tsafrir, *The History* (2004), p. 96.
[1056] Similarly, with respect to decreasing conflict with local population, Tsafrir, *The History* (2004), p. 96.
[1057] ʿAbdallah b. ʿAbd al-Raḥmān b. Muʿāwiya b. Ḥudaj (renowned legal scholar), ʿAayash b. ʿAukbah b. Kulaib al-Hadrami, Ghawth b. Sulayman (was judge in Egypt three times, d. 168), Hisham b. Humaid and others.

- What are you doing to us, Commander of the Faithful? Do you want us to be known in the provinces for our lands not having someone suitable for the *qāḍī* position so that you have to appoint someone over us from outside of Egypt?

- The caliph said: So suggest a man.

- Ibn Ḥudaj recommended to him al-Yaḥṣabī.

- The caliph said, this is a good choice but he is deaf.

- Ibn Ḥudaj: So Ibn Lahīʿa.

- And the caliph said: So be it. [1058]

The members of the Egyptian delegation requested an Egyptian *qāḍī*, and no one from outside of Egypt, appealing to their honor as scholars: no one should think that the local legal tradition was not capable of producing excellent candidates for adjudication. Their first choice was rejected because the candidate did not fulfill the requirement of physical intergrity, as his deafness would have caused difficulties in following the court session.[1059] The second choice was immediately granted by the caliph[1060]—although another account suggests that he had some reservations against the *qaḍī*:

"So shall it be, Ibn Lahīʿa despite his weak reason (*ḍuʿfi ʿaqlihi*) and his bad school (*sūʾi madhhabihi*)".[1061]

ʿAbdallāh b. Lahīʿa (d. 174/790) was a renowned Egyptian scholar who was considered to be close to the Mālikī school, but who preferred to retain his individualism and independence.[1062] He was of Hadramī, i.e. south Arab origin,[1063] reflecting the leadership of Egypt at that period: the families who formed early Muslim Egypt's elite, and who filled key positions in Egypt, were predominantly of Hadramī origin.[1064]

The Egyptian delegation succeeded with their choice of judge: they wanted someone from amongst them, from the same local Egyptian fabric. Though Ibn Lahīʿa did not exclusively follow the Mālikī law, he was still close enough to it to be associated with the locally dominant law school. Also, he belonged to the elite families of Egypt and thus

[1058] Kindī, *Kitāb al-Wulāh*, p. 369.
[1059] It comes as a surprise that a judicial candidate was proposed who was deaf, as physical integrity was considered necessary to be able to follow court preceedings, like hearing as in this case. See the normative writings on physical integrity as a criterion for the eligibility of the judiciary. See Chapter Two, V.1.a.
[1060] Abdallāh b. Lahīʿa was the first *qāḍī* in Egypt to be appointed by the caliph and not by the governor (155/771), Kindī, *Kitāb al-Wulāh*, p. 368; Ibn ʿAbd al-Ḥakam, *Futūh Misr*, p. 244. Further on the life and his activity as judge, Khoury, *ʿAbd Allāh ibn Lahīʿa* (1986) Rosenthal, "Abdallah b. Lahīʿa", *EI2*, p. 853.
[1061] Kindī, *Kitāb al-Wulāh*, pp. 368-369.
[1062] Tsafrir, *The History* (2004), p. 95.
[1063] Kindī, *Kitāb al-Wulāh*, p. 369.
[1064] Kennedy, *The Prophet and the Age of the Caliphates* (2004), p. 309; On the dominance of the Hadramis (Yemeni region) among the *qāḍīs* of Egypt, Kindī, *Kitāb al-Wulāh*, pp. 425-426 and the list of *qāḍīs* in Egypt, Tsafrir, *The History* (2004), pp. 101-102.

was considered a native and representative of Egypt.[1065] As a local, he was probably interested in maintaining the legal status quo and would not introduce unwanted legal innovations. The delegation could persuade the caliph, although, if the account is true, the caliph did not think highly of this judge.

It has been discussed whether the 'bad school' refers to Ibn Lahīʿa's defiance and rebelliousness. The expression also caused speculations about whether Shīʿite tendencies were meant.[1066] Despite these unfavorable rumors, he remained *qāḍi* of Egypt from 155-164/771-780, as long as almost ten years,[1067] probably precisely because he had the support of the local scholars and was from among the local Egyptian population. The caliph was willing to take local legal interests into consideration, surely because the choice of the judiciary with the backing of the local jurisconsults was an effective way to create stability for the Abbasids in their province: a judge supported by the local jurisconsults is the best guarantee to have similar understandings of law applied, and to avoid friction, trouble or even uproar in an economically crucial province.

dd. Egyptian choice of Egyptian judge *ʿIsa b. al- Munkadir*

In the following case, a Ḥanafī judge in Egypt is to be replaced by a new one. The jurisconsults hope to now push through with a local candidate of the Mālikī school and discuss the eligibilitiy of the proposed contestants. In fact, they succeed in having ʿIsa b. Munkadir, a Mālikī, succeed the Ḥanafī judge Ibrahīm b. al-Jarrāḥ in 212/827, but the discussions turned quite heated as present candidates are discussed and criticized.

On how al-Munkadir became judge. [*Amīr*, governor] Ibn Ṭāher ordered the people of Egypt to gather. […]

- Ibn Ṭāher said: I asked you to gather for you to choose a judge.

- The first to open the debate was Yaḥya al-Bakīr, he said: Oh you governor. Appoint for our adjudication (*qāḍā'*) whom you think fit, but keep us far from two men: do not appoint anyone foreign and not anyone who speaks gossip (*zarāʿan*), the foreigner meaning [the outgoing judge] Ibrahīm b. al-Jarrāḥ, and the gossiper is ʿIsa b. Fulayḥ.

- [*Qāḍī*] Ibrahīm b. al-Jarrāḥ, who was present, rose and said: May God guided the governor (*aslaha Allahu al-amīr*), (choose) a man from the [Abbasid] sons of the state (*abnā' al-dawla*), wise and experienced (*qadīm al-ḥurma*). [But *amīr*] Ibn al-Ṭaher ignored him.

[1065] Tsafrir, *The History* (2004), p. 165, note 19.
[1066] See van Ess, *Theologie und Gesellschaft* (1997), II, p. 717. Against the assumption that Shīʿite inclinations are meant, see Khoury, *ʿAbd Allāh ibn Lahīʿa* (1986), pp. 46.
[1067] Kindī, *Kitāb al-Wulāh*, p. 370.

Then Abū Ḍamrah al-Zuhrī who was present [said]: May God guided the governor (*aṣlaḥa Allah al-amīr*), (I nominate) Iṣbigh[1068] b. al-Faraj, the jurist and scholar (*al-faqīh al-ʿālim*). Iṣbigh was present in the gathering.

This proposal was rejected by one of the present persons, Aba Dhamra Saʿīd b. Kathīr b. ʿUfayr: "Do not appoint the sons of the dyers since they are not meant to attend these gatherings."[1069]

Iṣbagh stood up and grabbed him by his coat and said to him: You are a devil. How do you know that I am from the sons of the dyers? The dispute rose and almost lead to an uproar.

Another present person mentioned the name of ʿIsa b. al- Munkadir and mentioned his good reputation and Ibn Ṭāher appointed him our judge.[1070]

Previously, [Mālikī jurist] Al-Buwayṭī had proposed six possible candidates (by name) to the governor[1071], amongst them ʿIsa b. al-Munkadir and one of the men who attended the gathering had proposed Isa b. al-Munkadir.

This gathering united around ten men. We cannot reconstruct exactly their biographies and positions in society. However, Iṣbigh's response in another account suggests that the caliph requested the jurists and the learned scholars (people of knowledge) to attend the gathering:

"The governor commanded the jurists and the people of knowledge to attend the gathering, not the poets and preachers."[1072]

The first person to speak made it clear that a Ḥanafī judge from Iraq, like the outgoing judge Ibrahīm b. al-Jarrāḥ, would not be welcome. This alludes to the fact that there was dissatisfaction with someone coming from outside Egypt, possibly because the law of the local Egyptian community, and Ḥanafī law or Iraqi custom showed cases of divergence. The concern over gossip may reflect a fear that a judge might deliver inaccurate information from Egypt to the caliph in Baghdad. This might have been important given that some judges were explicitly asked or encouraged to report on the ongoings in the province to the caliph.[1073] Perhaps if the judge was not from the same local community, and fabric, he was more likely to spread false information to the caliph—or fail to protect local interests by appropriate discretion.

The judge still in office, Ibrahīm b. al-Jarrāḥ, tried to give his opinion, namely that the judge should represent the Abbasid state, and be loyal to the state, as well as wise and

[1068] Or spelled Iṣbiʿ, Kindī, *Kitāb al-Wulāh*, p. 433, note 1.
[1069] Kindī, *Kitāb al-Wulāh*, pp. 433-434.
[1070] Kindī, *Kitāb al-Wulāh*, pp. 433-434.
[1071] Kindī, *Kitāb al-Wulāh*, p. 434.
[1072] Kindī, *Kitāb al-Wulāh*, p. 434.
[1073] Zaman, *Religion and Politics* (1997), p.124.

experienced. He himself was a Ḥanafī *qāḍī*[1074] in Egypt and served from 205-211/ 820-826[1075] and belonged to what he must have meant by "sons of the state" (*abnā' al-dawla*): he was from Iraq, a Ḥanafī, and he followed the official Abbasid state doctrine, namely that he believed in the createdness of the Qur'ān already in 217/ 832, even before the Abbasid caliphs introduced a rigid inquiry (*miḥna*) into all officials following this dogma.[1076] However, he was ignored by the governor, now that he was about to be dismissed, and given that his opinion was little valued by the local Egpytians.

When judicial candidate Iṣbigh was proposed, it was his social background that was rejected. Though Iṣbigh is documented as a jurist with adequate legal knowledge for the post of the judge[1077], he was rejected because the sons of the dyers are considered not to have the background wished for to exercise adjudication. Though social class is not a consideration mentioned in the normative qualification criteria[1078], it still comes to no surprise that exclusion based on class was articulated and attempted. The fact that Iṣbigh was said that his social background does not even allow him to attend these gatherings, allows the assumption that both jurists and nobility attended the gathering, or that the jurists present also represented the nobility of Egypt.

The third, and last, candidate mentioned was then appointed: Given his good reputation no objection was made to him, so that ʿIsā b. al-Munkadir, from the local Mālikī school could finally be appointed, replacing the Ḥanafī *qāḍī* Ibrahīm al-Jarrāḥ.

With their choice of this *qāḍī*, the local jurists (and nobility) could make sure that there was legal congruence between the law applied by the judges and the law taught and represented by the majority of legal scholars in Egypt of that time[1079]— and elite property interests protected.

It did not seem to have helped much either that the Ḥanafī *qāḍī* in Egypt used to note the variant views of Abu Ḥanīfa, Mālik and others on the back of the case record, deliberate over them for a long time and then mark the one he preferred as an indication

[1074] Kindī, *Kitāb al-Wulāh*, pp. 427-428.
[1075] Kindī, *Kitāb al-Wulāh*, pp. 427, 432.
[1076] Tsafrir, *The History* (2004), p. 99.
[1077] Kindī, *Kitāb al-Wulāh*, p. 434 Fn 2: Iṣbigh b. al-Faraj (d. 125/742) was a client (*mawlā*) of ʿAbd al-ʿAzī b. Marwān, a jurist knowledgable in jurisprudence (*fiqh*) and legal disputation (*nadhar*), information by the editor.
[1078] See criteria of eligibility for the judiciary, Chapter Two, V.1.a.
[1079] Tsafrir, *The History* (2004), p. 165, note 19.

to his clerk that the judgment was to be prepared on that basis.[1080] This approach was noteworthy in that it included not only the different legal opinions of Ḥanafī jurists—great jurists Abū Ḥanīfa, Abū Yūsuf, and Ibn Abī Layla (who also belonged to the supports of the *ra'y* principle though was not a Ḥanafī)[1081]—but also Mālik b. Anas' legal opinion. Taking account of the Mālikī legal opinion made particular sense given that Ibrahīm b. Jarrāh was *qāḍī* in Egypt, where the Mālikī school of law was dominant.

Rather, the preceding Ḥanafī judge Ibrahīm al-Jarrāḥ seems to have had a tough time in Egypt, given that his law school adherence clashed with the local legal community that largely followed Mālikī law at that time. His precarious position is confirmed by the following account. The son of the *qāḍī*, in an effort to bring about the appointment of the Egyptian Muʿāwiya b. ʿAbdallāh as an examiner of the witnesses (*ṣāḥib al-masā'il*), said to him: "I think you should place an Egyptian in charge of examining the Egyptian witnesses in court, then they will leave you in peace".[1082] The son's advice to his father is clear: As a Ḥanafī judge, at least the judicial staff should be Egyptian, i.e. belonging to the Mālikī school. This way the Ḥanafī judge could guard himself from parts of the critique coming from a largely Mālikī legal community, it was hoped. Though it cannot be determined with certainty who is meant by "they" who are expected to leave the judge in peace, the judge might be protected from criticism if the chooses an examiner of the witnesses from among the Egyptians. It is probable that it would be the similar community that has previously pushed for certain judges: the community of the jurisconsults, making sure that those candidates become judges that follow their legal schools, in, like here, the laws of testimonies.

c. Conclusion: Quasi-Coercive, Collective Authority of Jurisconsults Over Judges

The jurisconsult's authority in choosing the judiciary was immense. The documented examples evidence three related findings: First, the jurisconsults influenced removals as well as appointments of judges. Second, jurisconsults often acted as collective authority towards both the judge and the caliph and were most effective as a united front. Third,

[1080] Kindī, *Kitāb al-Wulāh*, p. 432. See also Coulson, *A History of Islamic Law* (1964), p. 87.
[1081] On the legal disputes between Abu Yūsuf and Ibn Abī Layla, see Chapter Three, I.1.a.cc.
[1082] Kindī, *Kitāb al-Wulāh*, p. 428; Ibn Ḥajar, *Quḍāt Miṣr*, I, p. 25; Tsafrir, *The History* (1994), p. 165, note 19.

when jurisconsults did not succeed with their persuasive authority vis-à-vis the judge, they were able to apply quasi-coercive authority over him by involving the caliph.

The jurisconsults' criticism that led to removals of judges seems to have been twofold: In some cases, legal errors were articulated as reasons for removal. This concerned particularly the fields of testimony law and property law. The alleged errors, however, could simply be different legal understandings and interpretations of authoritative sources. The other type of criticism concerned a lack of moral and religious integrity of the judge. Integrity (*ʿadalah*) was considered a necessary quality that a judge should possess to guarantee a responsible dealing with the law and its consequences.[1083] Such was the case with judges Yaḥya b. Aktham and Abū Shayba. The first was accused of having repeatedly seduced young men, the second of having missed prayers without having redone them.[1084] The jurisconsults however were not always successful in challenging judges, and the caliph did not follow their advice for removal in every case, as the cases of Yaḥya b. Aktham and Abū Shayba evidence.

While jurisconsults affected both removals and appointments, the Iraqi examples show that the local jurisconsults were more successful in bringing about removals from office than new judicial appointments.[1085] Local legal scholars were widely involved in the choice of their *qāḍī*, at least until the end of the second century A.H., and they sometimes intervened to steer the careers of the judges.[1086]

M. Tillier in his seminal work on the *qāḍīs* of Iraq during the early 200 years of Abbasid rule (132-334/750-945) listed the reasons documented for the judges' removal from office. [1087] The only 22 cases where explanations are documented in the sources and/or given by the actors involved make for barely 11,5 percent of the overall known removals of judges of the Iraqi center Baghdad and the Iraqi provinces. As *Tillier* explains, out of these twenty-two removals, nine were due to "complaints by the local population".[1088] Five were because political opposition (on theological, state and

[1083] See a largely unanimous discussion of moral-religious integrity as a necessary qualification of the judge Chapter Two, V.1.a.
[1084] On Yaḥya b. Aktham, see this Chapter Three, I.2.ee. On Abū Shayba, see this Chapter Three, I.2.a.ee.
[1085] This is the case for the city of Basra and Wasit. *Tillier* argues that in Baghdad, where Abbasides usually had a free hand to apply the judicial policy of their choice, the unpopularity of some *qāḍīs* also caused their removal. Tillier, *Les Cadis* (2004), p. 248. However, I could not evidence that the removals in Baghdad were caused by the local jurisconsults. I could not find evidence for this documented in the judicial chronicles (*Akhbār al-quḍāt*) and Tillier does not cite any sources for this finding either.
[1086] Tillier, *Les Cadis* (2009), p. 244.
[1087] Tillier, *Les Cadis* (2009), p. 241.
[1088] Tillier, *Les Cadis* (2009), p. 241.

sectarian questions), three because of disobedience towards the chief justice, and two because of complaints by the governors. One case each was due to the bad education of the judge, his physical disability, and because of an institutional blockade (of two judges being appointed to the same local jurisdiction).[1089]

In affecting removals, jurisconsults were probably backed by (further elites of) the local population. While *Tillier* largely sees the changes in judiciary affected by the *vox populi*[1090] , I would argue that more precisely, it was the jurisconsults that had both the legal knowledge and the standing of an elite to successfully articulate their advice on the judiciary before the caliph. The critique was almost always articulated by legal scholars, sometimes joined by nobility, who presented their criticism first to the judge and then formed delegations to also present them to the caliph.

Appointments were a particularly sensitive issue at the beginning of the Abbasid period. The decades that followed the revolution that brought Abbasids to power, Abbasid caliphs were very conscious about making judicial appointments themselves.[1091] Jurisconsults' legal opinion together with public opinion influenced more the removals than the appointments possibly because it touched less upon the judicial policy of the caliph. Possibly removals were a touchy issue, testing the seriousness of the Abbasid claim to bring Islamic justice. Thus removals in case of legal and moral-religious opposition to the judge were an important indicator for Abbasid rule and legitimacy. There might have been the willingness to give the judiciary a chance when appointed, but not when mistakes and failures done in office already made legal public opinion take a stand against the judiciary.

In Egypt, however, the Egyptian jurisconsults are documented to have particularly affected appointments of judges. The Egyptian jurisconsults are reported to have clearly expressed their wish to have an Egyptian *qāḍī*, in the meeting with the caliph that lead to the appointment of the Egyptian qāḍī Ibn Lahīʿa in 155/771 and, similarly for the appointment of the Mālikī qāḍī ʿĪsā b. al-Munkadir in 212/827. [1092] With their choice of *qāḍīs*, they could make sure that there was legal congruence between the law applied by the judges and the law taught and represented by the majority of legal scholars in Egypt

[1089] See table, Tillier, *Les Cadis* (2009), p. 242.
[1090] Tillier, *Les Cadis* (2009), p. 248.
[1091] On caliphal reforms regarding judicial policy, like caliphal appointment of judges, see Chapter Four, I.1.a.
[1092] Kindī, *Kitāb al-Wulāh*, p. 428; Tsafrir, The History (2004), p. 165, note 19.

of that time–and that the economic order was upheld[1093] It is possible that with Egypt being further away than the Iraqi cities of Basra and Wasit, for example, it was more difficult to control the city once frustrations with the judge emerged. By the time the news would reach the caliph, turmoil in the region could have already challenged Abbasid rule in Egypt. Yet, the cases documented on jurisconsults affecting the appointment of judges remain very few so that it is difficult to assess whether they need to be treated as exceptions to the rule (of the caliph largely deciding on the judiciary withough the jurisconsult's involvement) or whether they were documented not because they were rare but because the jurisconsults were particularly persuasive in why they did not want to have judges from outside of Egypt appointed to judge over them.

The jurisconsults' authority was largely a collective one. The local legal scholars had no unified, corporated and institutional unity that brought them together or that they represented. Yet, they often performed their authority as an unincorporated body and community of legal scholars that collectively confronted the judge with his mistakes and his wrongdoings. They also appeared as delegations before the caliph, often preparing their accusations by collecting and writing information on the judge and presenting them before the caliph. Their success before the caliph was higher when they spoke with one voice and were unanimous in wanting the removal of the judge. When dissenting opinions on the exercise of the judiciary emerged, this resulted in a weakening of their position vis-à-vis the judge, so that the judges al-Anṣārī in Basra and Abū Shayba in Wasit, the interest of some to have these judges removed did not materialize. The more famous the jurisconsult was, the more likely it was, that his voice would be taken note of as a single critic, as the examples of Aḥmad b. Ḥanbal and Abū Ḥanīfa demonstrated, the first advocating against the appointment of Ibn Shaybah as judge for his position on endowment law and his theological-political take on the createdness of the Qur'ān debate, the second for openly critiquing judge Ibn Abī Laylā for, e.g., his judicial rule-making in cases of defamation.[1094]

The biographies of other legal scholars keep traces of further comparable private consultations.[1095] The consultative role of jurisconsults in the choice of *qāḍīs* thus

[1093] Tsafrir, *The History* (2004),p. 165, note 19.
[1094] On Aḥmad b. Ḥanbal's veto against judicial candidate Ibn Shayba, see this Chapter Three, I.2.a.kk. On Abū Ḥanīfa's critique of judge Ibn Abī Layla, see in this Chapter Three, I.1.c.
[1095] Tillier, *Les Cadis* (2009), p. 172.

remained – even though after the 840s we see the role transformed from less collegial bodies of jurisconsults, like we have seen them in the delegations visiting the caliph, to more single jurisconsults consulted by the political authorities on the judiciary. It reflects an ongoing authority of the legal scholar with a say over who takes over adjudication. However, while it elevates the opinion of the single consulted jurist, it probably makes it difficult for less known jurists to have their voice heard as part of a delegation.

The jurisconsult's authority was not only collective and persuasive. The authority could transform and become quasi-coercive in relation to the judge, namely when the jurist would not succeed with his persuasive argumentation towards the judge, or be ignored altogether. In this case, he could involve a third party, a political authority with coercive powers to affect the change that the jurisconsult with his persuasive powers alone could not. The quasi-coercive authority of the jurisconsult is comprised of threats (by jurisconsults) backed by possible sanctions (by political authorities).[1096] As jurisconsults, they have the ability to have their threats enforced, and those threatened are aware of this ability.[1097]

When judges obey the jurisconsult, they are likely to follow their own rationale: From the perspective of legal philosophy, judges do not obey the authority of the jurisconsult because they are told to do so by the jurisconsult, but only to avoid being sanctioned.[1098] While in Chapter Two, normative writings stressed that the judge who follows the jurisconsult should do so because he is persuaded by what constitutes binding law and the reasoning of the legal expertise, Chapter Three shows that there is another element for obeying the jurisconsult: the risk of being removed from office. The judge is threatened to stand before the legal community, the population or the caliph and to lose his reputation as legal scholar, and eventually his judicial position. In short, he risks his standing and authority *qua* judge to perform adjudication.

The jurisconsult's quasi-coercive authority also entails a relationship of asymmetrical authority, since the structural influence of one side, the jurisconsults is higher on the

[1096] Shapiro, "Authority" (2002), p. 395: "Authoritative directives are threats backed by sanctions."
[1097] Shapiro, "Authority" (2002), p. 396 who calls this *de facto* auhority.
[1098] See Shapiro, "Authority" (2002), p. 396: "Agents never obey simply because they are told to do so, [but only to avoid being punished]. Because the only reason that figures in deliberation is the threatened sanction, the moral autonomy of an agent is not thereby at risk."

action of the other side, the judge's, than the other way around.[1099] In Chapter Two, the relationship of authority between judge and jurisconsult was normatively described as one where the authority of the jurisconsult was not as such superior to the judge, as the judge was supposed to maintain the final say on adjudication, yet were both could jointly share the burden of interpretation and adjudication in sensitive cases.

The jurisconsult's authority vis-à-vis the judge then works with threats and promises[1100]: Authority reflects the value of the threats the *muftī* can effectively make against the *qāḍī* (informing caliph, requesting caliph to remove judge from office, mobilizing the population against the judge, harming reputation of the judge as ignorant, etc.). The promise entails that if the judge followed the *muftī's* legal opinion, he would laud the judge, enhance his reputation amongst the legal community, the population of his jurisdiction, and the ruler. To see the jurisconsults as simply "exercising their rights" [1101] or their tasks as critical legal thinkers to critique the judgments of the *qāḍī* would obscure the element of coercion that stands behind their respective threats and promises. The jurisconsult could make the caliph believe that the judge is not able to guarantee peace through justice, and thus remove the judge from office, based on the jurisconsult' advice. This is what makes the authority of the jurisconsult, once he involves political authorities, so strong vis-à-vis the judge. Jurisconsults possessed sufficient authority to deny or grant (the necessary) authority to a judge.

This quasi-coercive authority of the jurisconsult is eventually based on the voluntary behavior of the judge, or as *Shapiro* would say, on the autonomous deliberations of the judge.[1102] In this sense, the judge's behaviour responds to the situation of threat by aiming at a protective or preventive behavior.[1103] The judge reacts by assessing the potential threat and by attempting to cope with the threat, by developing a protective behavior.[1104] For scholar of communication studies *D. J. O'Keefe*, threat appraisal and coping appraisal is a reaction to persuasive authority. Indeed, quasi-coercive authority as developed here is a sub-category of (an extended) persuasive authority. Yet, I would

[1099] For asymmetrial relationships of authority, Bahrdt, *Schlüsselbegriffe der Soziologie* (2003), p. 162.
[1100] On the fundamental distinction of threats and promises and how they affect the agent's behaviour and bargaining power in law, Hale, "Coercion" (2006), p. 96; Kennedy, *The Canon* (2006), p. 88.
[1101] See Hale, "Coercion" (2006), p. 96.
[1102] See Shapiro, "Authority" (2002), p. 396.
[1103] O'Keefe, "Theories of Persuasion" (2009), p. 282.
[1104] O'Keefe, "Theories of Persuasion" (2009), p. 282.

like to widen the understanding of persuasive authority as a form of authority that can in fact (counter-intuitively) entail coercive elements: Some seemingly non-coercive forms of authority can entail threats and promises causing coercion by involving a third person possessing coercive authority. This way, the persuasive authority expands his or her instruments of action beyond what formally is attributed to his or her function. A jurisconsult who *qua* jurisconsult is meant to issue non-binding legal opinions and provide legal consultation expands his instrumentarium and enlarges his authority through including a coercive authority in his range of actions.

Quasi-coercive authority only functions when the receiving side, the *qāḍī* in our case, is cognizant of the enlarged repertoire of the authority he is facing.[1105] The judge has to be aware of the threat, its severity (what problems the jurisconsult can cause him) and how vulnerable he is through this threat (i.e. how likely he is to suffer the threat).[1106]

The judge is and perceives himself as vulnerable as his position is eventually dependent on the caliph. There is no judicial independence from the caliph: judges enjoy no fixed tenure and there is no exclusive list of reasons for removals by the caliph. This weakens the judge's authority: both vis-à-vis the caliph, and vis-à-vis the jurisconsult who can affect removal.

So to cope with the quasi-coercive authority of the jurisconsult, the judge theoretically needs to figure out an effective response that protects him from the threats and their realization, and to perform an adequate behaviour. [1107] For the judge to request jurisconsults to support him in adjudication, especially when they are of different legal school in a local jurisdiction that does not follow the legal teaching of the judge, is such coping mechanism. These cases are highlighted further on.

3. Consultation During Litigation, Before Issuing Judgment

Normative writings on consultation (*mushāwara*) typically see consultation as something that ought to occur during litigation and before a judgment is passed: A case

[1105] O'Keefe, "Theories of Persuasion", (2009), p. 282.
[1106] O'Keefe, "Theories of Persuasion" (2009), p. 282. O'Keefe explains this as determinants of threat appraisal: perceived threat severity (the perception of how bad the problem is) and perceived threat vulnerability (the perception of how likely one is to suffer the threat).
[1107] O'Keefe, "Theories of Persuasion" (2009), p. 282. This is what O'Keefe calls the determinants of coping appraisal: perceived response efficacy (how effective the behavior is in conferring protection) and perceived self-efficacy (one's perception of one's ability to perform the behavior).

entailing juridical uncertainty necessitates the judge to seek extrajudicial consultation to inform the judgment. The judge receives the legal opinion and should deliberate if or when to adopt it to the litigation at court.

a. Ḥanafī Judge *Makhzūmī* in Basra Deferring to the Council of Jurists

Wakīʿ documents the difficulty of the first Ḥanafī judge to serve in the Iraqi city of Basra.[1108] *Qāḍī* Makhzūmī, serving during caliph Harūn's reign (169-193/786-809) was hesitant to judge the case (of which we do not know the details) brought before him. His Ḥanafī legal tradition diverged from the Basran legal tradition, the dominant local tradition, and he wondered how he could serve the interests of the local litigant.

> A woman had presented [a case] to Abd al-Raḥmān b. Muḥammad al-Makhẓūmī, *qāḍī* of Basra. As she has grown impatient with his slow handling of her case, he stood up in front of her and said to her: "Your case poses me a problem, even though I know what for me is consistent with good law and what for me is not wrong. Therefore show patience. But if you wish that I speak about it to the governor (*amīr*) who can gather the jurists of Basra (*fuqahāʾ al-Basra*) for you, I will do so. Or if you wish, I will write to the Commander the Faithful [the caliph] so that I will present your case to the jurists (*fuqahāʾ*) that are with him.[1109]

Obviously, the *qāḍī* was aware that a judgment loyal to his legal school conviction risked being badly received not only by the litigant but also by the local community of legal scholars. This is why he proposes to the litigant to either have the jurisconsults on the local level convene (summoned by the governor), or the jurisconsults on the imperial level (summoned by the caliph).[1110]

Judge Makhzūmī's proposal about the following procedure was in accordance with many stipulations in judicial appointment certificates. Letters of appointment required judges, in fact, that *qāḍīs* when faced with difficult problems write to the jurisconsults or to the caliph as last resort caliph when faced with difficult problems. A standard example of such a letter, preserved in Qudāma b. Jaʿfar's Kitāb al-Kharāj reads, in part, as follows: "[The commander of the Faithful] has ordered him [sc. the *qāḍī*] that if something is difficult to decide, he should resort to consultation and discussion with people of [sound] opinion and insight in judicial matters (*qaḍāʾ*) so that the matter can be resolved. If [the matter at hand] remains obscure to the *qāḍī*, let him write to the

[1108] Wakīʿ, *Akhbār al-quḍāt*, II, p. 142.
[1109] Wakīʿ, *Akhbār al-quḍāt*, II, p. 142.
[1110] Qudāma b. Jaʿfar, *Kitāb al-Kharāj*, p. 23, as quoted and translated by Zaman, *Religion and Politics* (2007), p. 104.

Commander of the Faithful [and] explain the matter fully and truthfully…so that [the latter] can give an answer according to which…[the *qāḍī*] may [then] act."[1111]

Qāḍī Makhẓūmī preferred to postpone and withhold his judgment and have the case transferred to the jurisconsults.[1112] This was a choice with substantial implications, though: turning to the "jurists of Basra" would mean to give priority of the legal solutions represented by the local school of Basra; or, on the other hand, calling the jurists of the caliphal court, that were maybe already dominated by the legal scholars belonging to the Ḥanafī circles around Abū Yūsuf, would more likely lead to a judgment corresponding to the position of the *qāḍī* himself.[1113] As most cases of authority clash in Basra show, Ḥanafī and Basran legal understandings clashed on crucial issues, potentially threatening the *qāḍī's* position in the Basran community. Stuck between his own doctrinal adherence and conviction and the prevailing ones of the Basrans, Makhzūmī seems to have wanted to take refuge behind the collective authority of other jurists whose consensus would have a greater legitimacy than his individual decision.[1114]

So while normatively, the adherence of the schools of law was not mentioned as a significant criterion to instigate judicial consultation, the case of judge Makhẓūmī evidences that the different school adherence of judge and the adjudicated population and its legal community triggered the referral to the authority of the jurisconsults.

The first *qāḍī* "declaring the doctrine of Abū Ḥanīfa"[1115] in Basra, Makhzūmī was not well received by the local jurists. His careful approach could not save him in the end. The legal and social community was not willing to accept Ḥanafī adjudication and rejected the judge, who was removed from office after only four months in the year 173-174/789-790.[1116]

This example of a Ḥanafī judge in the city of Basra with its own legal tradition is significant in that it shows how school divergences played out between the judiciary and the local legal scholars who could well influence the fate of the judge:

[1111] Qudāma b. Jaʿfar, *Kitāb al-Kharāj*, p. 23, as quoted and translated by Zaman, *Religion and Politics* (2007), p. 104.
[1112] On postponing judgment in difficult cases in order to wait for the jurisconsult's legal opinion, see Chapter Two, V.2.b.aa. (1.).
[1113] Tillier, *Les Cadis* (2009), p. 179.
[1114] Tillier, *Les Cadis* (2009), p. 179.
[1115] Wakīʿ, *Akhbār al-quḍāt*, II, p. 142: *yaqūl bi-qawl Abī Ḥanifa.*
[1116] Wakīʿ, *Akhbār al-quḍāt*, II, p. 142.

In fact, after the Ḥanafī experience with *qāḍi* Makhzūmī in Basra, there was no further Ḥanafī to become judge in Basra for the next twenty years (until the end of the reign of caliph Harūn).[1117] A potential Ḥanafī *qāḍī*, Muḥammad b. ʿAbd Allāh al-Anṣārī (d. 225/839) who actually was a Basran legal scholar himself, was first refused by the local jurisconsults because of his legal affiliation.[1118] A few years later, when up for the judiciary again, when the legal developments in Basra had changed and Ḥanafī legal ideas successfully spread and became incorporated, Al-Anṣārī finally became judge. He then remained a little longer in office than the first Ḥanafī *qāḍī* in Basra, but was nevertheless removed from office at the end of barely one year (in office 191-192/806-807)[1119], possibly because the population of Basra was still not completely ready to approve of a *qāḍī* of Ḥanafi legal thought.[1120] On the other hand, six years later, al-Anṣārī was again chosen, after consultations with multiple individuals from Basra over a longer period of time.[1121] The acceptance of a Ḥanafī *qāḍī*, who this time remained in office, is likely to have corresponded with an acceptance of the teachings and doctrines of Abū Ḥanīfa and his followers in the legal community of Basra.[1122]

The relationship of judge and jurisconsults thus was to a large extent shaped by their respective school adherence. Divergent schools meant more friction between them. *Qāḍī* Makhzūmī sought to cope with this challenge by submitting to the authority of the jurisconsults, transferring his rights (and duty) to adjudicate to the jurisconsults, making them effectively judging the case.

b. *Ḥanafī* Judge *Bakkār* in Egypt Adopting *Mālikī* Opinions to Overrule *Mālikī* Judgment

As explained above, Ḥanafī appointments also caused friction in Mālikī-dominated Egypt. Judge Bakkār b. Qutaybah (184-270/800-883) was one such Basran-Ḥanafī jurist who was appointed by caliph al-Mutawakkil in 246/860 to serve in Egypt.[1123] We have previously encountered Bakkār requesting local legal jurisconsults who knew

[1117] Tillier, *Les Cadis* (2009), p. 179; Melchert, *The Formation* (1997), p. 42; Tsafrir, *The History* (2004), p. 36.
[1118] Al-Anṣārī was initially turned down as judge by the Basran delegation of jurisconsults to the caliph, see Chapter Three, I.2.a.bb.
[1119] Wakīʿ, *Akhbār al-quḍāṭ*, II, p. 154, without reason for the removal explicitly mentioned.
[1120] *Tillier*, *Les Cadis* (2009), p. 180.
[1121] Amongst the consulted persons are Yazid b. Abd Al-Malik al-Numeiri, without further information on his biography provided. No specific time period is mentioned. *Wakīʿ*, *Akhbār al-quḍāṭ*, II, p. 157.
[1122] Tillier, *Les Cadis* (2009), p. 180.
[1123] Kindī, *Kitāb al-Wulāh*, p. 477.

Mālikī law.[1124] In fact, the following is an example of the judge reaching out to the jurisconsult previously selected.

Bakkār solicited Mālikī jurisconsult's Yūnus' advice in a variety of unspecified cases[1125]—and in a famous inheritance case, that went back and forth between Ḥanafī and Mālikī judges over generations. This case became known as the "house of the elephant" and is partly treated here as well as revisited as a case of appeal further down.[1126] The case was indeed the first big case that Bakkār had to take care of, and it put him into immediate considerable trouble, as it involved an issue of incompatible confrontation between his and the local jurisprudence:

Bakkār b. Qutayba's immediate charge as *qāḍī* for Egypt was to reverse a ruling of one of his Mālikī predecessors. Al-Ḥarīth ibn Miskīn (d. 250) had been *qāḍī* of Egypt since 237/851. About eight years into his office, in 245/859, some would-be heirs against whom Miskīn had ruled, appealed in Baghdad, where caliph al-Mutawakkil summoned some Kufan, Ḥanafī jurisconsults to review the ruling of Mālikī judge Miskīn. The jurisconsults decided against the ruling of judge Miskīn, whereupon Miskīn requested to resign from office. The case went back to new judge Bakkār ibn Qutaybah, his successor, who was instructed by the caliph al-Mutawakkil to overturn his ruling.[1127] In this case, it was indeed Yūnus who finally persuaded judge Bakkār to annul the judgment of his predecessor, judge Ḥārith al-Miskīn, who had adjudicated based on Māliki law:

"Bakkār felt uncomfortable to annul the verdict of al-Ḥārith since [all he has done] al-Ḥārith based his verdict on the school (*madhhab)* of the people of Medina. And Yūnus b. ʿAbd al-Aʿla [the jurisconsult] kept speaking to Bakkār and persuaded him until he [Bakkār] judged accordingly and returned the house to Ibn al- Sā'iḥ."[1128]

Bakkār was hesitant to overturn his predecessor's ruling since he did not violate the law but rather applied his law school understanding to the case than the dominant local tradition. It was the jurisconsult Yūnus, then still following Māliki teaching, who persuaded judge Bakkār to apply the Kūfan jurisconsults' legal opinion. Bakkār was

[1124] On Judge Bakkār seeking Māliki jurisconsults, see this Chapter Three I.1.b.bb.
[1125] Kindī, *Kitāb al-Wulāh*, pp. 474-475.
[1126] Ibn Ḥajar, *Raf'al-Iṣr*, p. 124; Kindī, *Kitāb al-Wulāh*, p. 472-475, p. 502. The entire case is ranslated into French by Tillier, *Vies de cadis de Misr* (2006) p. 51.
[1127] Kindī, *Kitāb al-Wulāh*, pp. 474-475.
[1128] Kindī, *Kitāb al-Wulāh*, p. 475. In a similar version it says: "Yūnus persuaded Bakkār to annul the verdict of al- Ḥārith b. Miskīn on the dār al-fīl [name of the case: house of the elephant], and this is what Bakkār did." Kindī, *Kitāb al-Wulāh*, p. 506.

surely pressed to revise the case by the council of jurists who decided on appeal. But their decision does not entirely explain his hesitation to annul his predecessor's judgment. What was needed was jurisconsult Yūnus influencing the judge to follow the decision of the council. One can only speculate about judge Bakkār's motivation for eventually adopting the advice of his jurisconsult; the sources do not further problematize this decision. Bakkār's decision indicates though that it was safe to rule against local tradition, if the authority of the *qāḍī* was supported by the authority of the jurisconsult. Bakkār thus followed two jurisconsults known for their local legal expertise and trustworthiness, and he adopted their advice into his adjudication. He sought his legitimacy as a judge in the legitimacy of the jurisconsult and his (local) legal knowledge.

c. Endowment Case in Egypt: *Mālikī* Judge and *Mālikī* Jurisconsult

Though scholarly opinions are private opinions without power to bind the courts, the following case illustrates how a *fatwā* was requested for an ongoing trial, and incorporated into a judgment.

The Egyptian *qāḍi* Al-Mufaḍḍal b. Faḍālah (106 or 107-181/724 or 725-797) was appointed *qāḍi* in 168/784 by caliph al-Mahdi.[1129] For his second tenure, he was appointed by caliph Harūn al-Rashīd in 174[1130] and remained in office until 177.[1131] As an Egyptian judge in Egypt he was a local who represented the local legal tradition. Nevertheless, he requested consultation on case of property law. Following the local Mālikī tradition, he consulted the eminent jurist Mālik b. Anas himself, who resided in Medina.

The judge in detail describes the facts of a long-disputed case as presented to him by the litigants, each were children of the two sons of the deceased: the grandchildren fought each other in court.[1132] The core question was whether one party of the trial was entitled to their share of inheritance rights or not. For that, in return, *qāḍī* Mufaḍḍāl had to declare whether the property in question was a valid endowment (*waqf*) or not. If the property, a house and a mill, was a valid endowment, then the grandchildren would not

[1129] Kindī, *Kitāb al-Wulāh*, p. 379.
[1130] For his second tenure, Mufaḍḍal was actually appointed by the governor of Egypt which was followed by the appointment certificate of caliph Harūn al- Rashīd in 174, Ibn Ḥajar in *Raf' al-iṣr*, p.131 in Kindī, *Kitāb al-Wulāh*, p. 379.
[1131] Kindī, *Kitāb al-Wulāh*, p. 387.
[1132] Ibn Ḥajar, *Raf' al-Iṣr* on al-Mufaḍḍal, p. 135 in Kindī, *Kitāb al-Wulāh*, p. 387.

be entitled to any inheritance share, except for one-third. Mufaḍḍal seems to have been uncertain about whether endowment is valid despite land tax not having been paid on it. His predecessor *qāḍī* Khayr b. Nuʿaym had already decided the case with respect to the father of one of the litigants, and rejected any inheritance rights beyond one-third. Now the litigants approach *qāḍī* Mufaḍḍal to have their rights as grandchildren examined, disputing that the property was ever declared endowment by their grandfather. Jurisconsult Mālik b. Anas examined the case, as presented to him by the judge, and wrote back to *qāḍī* Mufaḍḍal concluding: "The endowment cannot be declared invalid just because land tax was not paid." Judge Mufaḍḍal adopted Mālik's opinion to the case, declared the endowment to be valid and awarded nothing more than one-third of the inheritance rights to the property.

In this case, the judge voluntarily requested a legal opinion in an ongoing litigation case and presented the facts to the jurisconsult. The jurisconsult gave him the legal opinion regarding questions of property law, endowment and inheritance rights according to his school doctrine, shared by the judge. The question posed on property law was one that could not be determined by the authoritative texts alone. To overcome this juridical and judicial uncertainty, the judge reached out to the most prominent jurist of the Mālikī school, Mālik b. Anas himself. The judge himself belonged to the Māliki school, thus chose a jurisconsult of the same school, and of the school most prominently represented in Egypt, the local jurisdiction he was in charge of. This case was not a conflict of different schools of law, but the difficulty initially lay with discerning the laws of the own school. In fact, the case was particularly difficult and doctrinally disputed, so that we come back to it again in an instance of appeal (where it then developed into a conflict of different schools).[1133]

d. Capital Punishment Case in Egypt: *Mālikī* Judge and *Māliki* Jurisconsult

The following case is a further illustration of how a *fatwā* was requested for an ongoing litigation, incorporated into a judgment. It is again *qāḍī* Al-Mufaḍḍāl b. Faḍālah of Egypt requesting judicial advice from eminent jurist Mālik b. Anas.[1134]

In Egypt a Christian insulted the Prophet (Peace be upon Him), saying that had the Prophet been [burned to death], people would have been relieved from him. *Qāḍī* Al-

[1133] The case "house of elephant" is discussed in Chapter Three, I. 4.b.

[1134] Al-Mufaḍḍal b. Faḍālah was born 106 or 7 and died 181. He was appointed judge in 168 by caliph al-Mahdi, receiving 30 dinar every month. He was dismissed in 169, and remained in office for one year and three months, Kindī, *Kitāb al-Wulāh*, p. 383.

Mufaḍḍal b. Faḍālah wrote to Mālik b. Anas (May God have mercy on him) asking him whether he [the Christian] should be killed. Mālik wrote back ordering his killing. And the Egyptian governor (ʿAlī b. Sulaymān al- Hāshimī, or ed. Al-Qāsimī) killed the Christian.[1135]

With *qāḍī* Al-Mufaḍḍal sitting in Egypt and Mālik b. Anas living in Medina, it is likely that the correspondence between the two evolved in writing. The *fatwā* itself or the judge's question on how to deal with this case, does not seem to have been preserved in any other way than in this judicial chronicle, where we only know about the final outcome. We neither know how *qāḍī* Mufaḍḍāl posed the legal question, nor do we know how *muftī* Mālik b. Anas conveyed what he considered the right legal answer.

Nevertheless, the case exemplifies that the *fatwā* provided the judge with access to legal knowledge in the form of a considered opinion. The question if or how to sentence a person insulting the Prophet is anything but transparent in the foundational texts of Islam.[1136] Blasphemy was legally categorized as a sub-group of apostasy when it met the conditions of the crime of insulting the Prophet (*sabb al-nabī*). In that case, it was debated whether the apostate is given the opportunity for repentance or had to be killed immediately after the sentence.[1137] Both *qāḍī* and *muftī* belong to the same law school, which was also the dominant school in Egypt. *Qāḍī* al-Mufaḍḍal might have wanted to seek the backing for his judgment and sought support regarding the responsibility of finding what the law was: navigating through the sources, searching for precedent (the precedent considered valid by Mālik ibn Anas, which is the precedent of the people of Medina) or an analogous case or, possibly, excercising independent legal reasoning (*ijtihād*).

e. Capital Punishment Case in Kufa: Rejecting Unanimous Scholarly Advice over Problematic Evidence

Judicial consultation during litigation was perhaps a means of legal validation vis-à-vis the community–when the case is particularly difficult, legally or politically and the jurisconsults' backing and legitimization was considered important to communicate the outcome of the case. The following was such a sensitive case where the death penalty had to be negotiated for the crime of blasphemy against one of the former righteous caliphs. Public sentiment in the Iraqi city of Kufa is said to have run high in reaction to

[1135] Kindī, *Kitāb al-Wulāh*, p. 382.
[1136] Rabb, *Doubt's Benefit* (2009), p.x.
[1137] Peters, *Crime and Punishment*, (2005), p. 65.

the defendant's disrespect for former caliph and Prophetic companion ʿAlī, so that the population would have liked to have him executed. Arguably, throughout Islamic legal history, the consciousness for the irreversibility of death penalties often lead to the *qāḍī* requesting a *fatwā* before their execution, as a way to seek legitimacy for the drastic punishment.[1138] The judge of the Iraqi city of Kufa, Ghasān b. Muḥammad al-Marwazī, had been appointed by caliph al-Muʿtaṣim and was originally from the eastern province of Khurasān. It is recorded that he was not known to be a bearer of legal knowledge (*ʾilm)*.[1139] However, this case is striking because the judge, requesting a council of jurists to assist him in this case eventually did not follow their advice.

In the last days of caliph al-Muʿtaṣim's rule (r. 218-227/833-842), a man named Sālim was accused of having insulted ʿAlī b. Ṭālib, the fourth righteous caliph and cousin of the Prophet.[1140] A man filed a complaint to this effect with the *qāḍī* of Kufa, who requested the leading jurists (*fuqahāʿ*) of the town to legally examine the matter. In Kufa, the Ḥanafī teaching prominently emerged in the eighth century and was dominant amongst the legal community.[1141] Representatives of the ruling ʿAbbāsid and the ʿAlid families also attended the proceedings. It was suggested by some that Sālim's disrespect to ʿAlī was only a covert expression of his hostility to the Prophet (and the lawfulness of the caliphate), and thus a case of blasphemy, which ought to be sanctioned with the death penalty. Offenses that risk the death penalty are almost always highly tied up with the laws of evidence— as was the case here as well. Testimony in the case of *ḥadd* crime was a scholarly much debated issue and unity in theory and practice was far from being obtained[1142], and must have left ample space and necessity for judicial consultation.

The accused, Sālim, had allegedly accused the righteous caliph ʿAlī of murder and of not being entitled to the caliphate. Two witnesses accused Salīm (*shahada ʿalay*): two men who previously had never given testimony before any *qāḍī*, i.e. were not known to

[1138] On judges' moral discomfort imposing the death penalty, and generally on the Islamic tradition of "ḥudūd avoidance", Rabb, *Doubt's Benefit* (2009), pp. 126-136.
[1139] Wakīʿ, *Akhbār al-quḍāṭ*, III, p.191.
[1140] Wakiʿ, *Akhbār al-quḍāt*, III, pp. 191-193. No date of the incident is given, but it seems to have occurred sometime in the caliphate of al-Muʿtaṣim. The qāḍī presiding over the proceedings was an appointee of al-Muʿtaṣim, though he continued in office until he was removed by al-Mutawakkil, in 235/ 849-850, Wakīʿ, *Akhbār al-quḍāt*, III, p. 194. See also Zaman, *Religion and Politics*, p. 140, note 79.
[1141] Melchert, "How Hanafism Came to Originate in Kufa"(1999) who supports the Kufan-Hanafi dominance, yet speaks of the Baghdadi origine of Hanafi thought of law.
[1142] For a variety of scholarly debates on testimony between Ḥanafī, Shāfiʿī, Mālikī and Ḥanbalī scholars, see Rabb, *Doubt's Benefit* (2009), pp. 344-348.

be trustworthy witness. One of them kept pigeons and taught the pigeons to fly and bring back with them more pigeons (*yuʿalim al-ḥamām li aṣhāb al-ḥamām*), an occupation that was not thought highly of at that time. The report continues:

[Judge] Ghasān remained some days in the court and [then] requested a group of the jurists (*fuqahā'*), among them Yaḥya b. ʿAbd al-Ḥamīd al-Ḥimmānī[1143] and Quṭbah b. al-ʿAlā' and al-Walīd b. Ḥamād and the sons of Abī Shībāh.[1144] He [the judge] requested [the presence of] Sālim and the opposing party and two witnesses.

- And [*qāḍī* Ghaṣān] he said to the jurists: What do you think?

- Present were also a group of ʿAbbāsids and Ṭālibīn (people of Abī Ṭalib) [i.e. political representatives].

- [Jurist] Quṭbah said: Kill him and I bear the responsibility for his killing.

- [Jurist] Walīd b.Ḥamād said: This is the right punishment, because by saying what he said he is in opposition to the Prophet, Peace be Upon him, and harming the Prophet.

- [Jurist] Yaḥyā b. ʿAbd al-Ḥimmānī came closer and said: Oh Sālim, do you see what is being said about you on the matter of ʿAlī? If this were to be proven regarding a man saying the same on [caliphs] Abū Bakr, ʿUmar and ʿUthmān - how would you judge him?

- He (Sālīm) said: Regarding this statement?

- Yes, this statement.

- He (Sālim) said: Killing and burning!

- He (jurist Yaḥya b. ʿAbd al- Ḥimmānī) addressed (*qāḍī*) Ghasān and said: May Allāh reconcile the *qāḍī* who obliged himself with something we do not oblige him to. God has placed Abū Bakr, ʿUmar and ʿUthmān and ʿAlī [all the four righteous caliphs] in one rank, all are enjoying the same esteem (*fadel*). [1145]

The jurists were unanimous: they opted for the death penalty, and defendant Salīm himself said that someone making the statement he made, deserves the death penalty. Jurisconsult Quṭbah even explicitly articulated his willingness to share the burden of the death penalty, by exclaiming "I bear the responsibility for his killing", and thus attempted to encourage the judge to in taking this irreversible decision. The atmosphere was loaded: Not only the jurists advised for Salīm to be killed but also the people would have liked to have him executed, and the police had to break up the crowd who had assembled in front of the mosque where the trial took place so that the *qāḍī* could leave after he issued his judgment.[1146] However, the judge decided against the counsel of the

[1143] Yaḥyā b. ʿAbd al- Ḥamīd al-Ḥimmānī was a traditionist who came from Samarra, Iraq and most likely died in 228/ 842-843, a year after caliph al- Muʿtaṣim's death, Khatib al-Baghdadi, *Ta'rīkh Baghdad*, XIV, p. 167-177, 176 (nr. 7483), Zaman assumes that al-Ḥimmānī could have benefited from caliphal patronage, Zaman, *Religion and Politics* (1997), p. 140, note 79.
[1144] Wakīʿ, *Akhbār al-quḍāt*, III, p. 192.
[1145] Wakiʿ, *Akhbār al-quḍāt*, III, p. 191-193.
[1146] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 193. Zaman, *Religion and Politics* (1997), p. 142.

jurisconsults: in the end, it was (only) with flogging (twenty-seven strikes) and imprisonment that the deed was punished.[1147]

It cannot be said with certainty what made the judge diverge from the jurisconsult's counsel, the will of the people, and the later statements made by the political representatives present, all of whom opted for the death penalty. The judge's divergence is even more surprising given that he was not known to be legally very knowledgeable, however, he could have well feared sanction in afterlife in case of a judicial (irreversible) mistake. It could have been the weak evidence that dissuaded the judge from the grave penalty, given that conventionally the occupation of the pigeon holders was considered deceitful and those who practice it liars. False testimony was much debated in Muslim evidentiary contexts from the earliest periods.[1148] Also, by excluding the testimony of the pigeon holder, the judge would have remained with one witness which according to doctrine was highly disputed.[1149] It also remains unclear whether Sālim, when asked how he would judge the case, was giving a confession, although jurist Yahya's reaction indicates that he was not. In any case, the conditions for confession were not met, as most legal scholars stipulate that a confession needs to be repeated multiple times.[1150] In fact, the Ḥanafī school, for instance, knows a debate about the validity of a single confession without corroborating evidence, and discusses whether this removes any doubt to go on with the *ḥadd* punishment, possibly like in this case.[1151]

Unfortunately, the jurisconsults' position on these questions of testimony and death penalty in this case of blasphemy were nowhere explained or illustrated any further. We do not know what allowed them overcome the strict rules of testimony to demand for the dealth penalty. It is likely that while evidence did not meet the strict criteria for punishment as a *ḥadd* crime, proof was sufficient for the lower threshold conviction.[1152]

[1147] The report says that the punishment was raised to thirty strikes, Wakīʿ, *Akhbār al-quḍāt*, III, p. 193. Zaman, *Religion and Politics* (1997), p. 140.

[1148] Rabb, *Doubt's Benefit* (1997), p. 255. Rabb also refers to false evidence as the major issue plaguing medieval Christian judicial contexts where judges and jurors were concerned with their standing before God and their own salvation; the problem explained much of the shifting procedures of the criminal trial. See Whitman, *Reasonable Doubt* (2008), pp. 114-116.

[1149] Some judges in deed based their judgment on one witness although legal doctrine required two witnesses, Masud, "The Study of Wakīʿs" (2008), p. 123.

[1150] Many scholars require four confessions in analogy to the four witness requirement in the case of *ḥadd* crime (for the crime of fornication, with similar reasoning for other *ḥadd* crimes), yet Shāfiʿī requires only a single confession. Shāfiʿī, *Kitāb al-umm*, VII, pp. 390-391; see Rabb, *Doubt's Benefit* (2009), p. 212.

[1151] For the discussion on the number of confessions, and corroborating testimony necessary to remove doubt of the judge on the ḥadd crime see, see Rabb, *Doubt's Benefit* (2009), p. 267.

[1152] On discretionary punishment of cases not meeting the strict criteria of ḥudūd, see e.g. Vikør, *Between God and the Sultan* (2005), p. 285-286.

The judge could the still punish the accused employing a discretionary punishment, which is what *qāḍī* Ghaṣān seems to have opted for.

For our question of authority between judge and jurisconsult, it is of relevance that the *qāḍī* did not follow and did not implement the jurists' advice: instead of killing Sālim (the unanimous opinon of the jurists), the judge ordered him to be flogged and imprisoned.

The case was politically sensitive, as it was on the legality of the caliphate, and was possibly alluding to a Sunni-Shīʿa divide that was harmful for the stability of the caliphate. The political loadedness of the case explains why the judge involved the leading jurists: *Qāḍī* Ghasān initially did not want to alone carry the responsibllity for this case, and sought the legitimacy of a circle of jurists. Yet, he eventually could not be persuaded to follow the jurists' counsel.

The counsel of the jurists proved to be non-binding on the judge in fact: persuasiveness by definition is always open to a reaction that disregards it. More than that, it is a crucial aspect of the relationship between expert and advisee that the advisee should not act on expert advice when he or she knows it to be wrong. [1153] There is no value in deferring to the authority of experts when one knows them to be wrong – "one relies on theoretical authorities because, and only because, one wants to know what is right".[1154] By contrast, practical authorities, such as political authorities, claim the right to obligate even when they are wrong. Persuasive authority means that it can also be challenged and justifiably refused, persuasive authority is not absolute.[1155] Having faced even the unanimous authority of jurisconsults does not mean that 'disobedience' was no longer an option.[1156] The legal opinion of the jurisconsults is non-binding and can be rejected at will, unless its arguments are considered sufficiently persuasive by the judge.

The chronicle does not document how the jurisconsults reacted to the judge's affront, and whether the jurisconsults sought a way to reject the judge and his adjudication, as a way to punish him for not having followed their advice. If they did, they were unsuccessful: appointed by caliph al-Muʿtasim (r. 218-227/833-842), judge Ghasān remained in office

[1153] Shapiro, "Authority" (2002), p. 399.
[1154] Shapiro, "Authority" (2002), p. 399.
[1155] See Raz, *The Morality of Freedom* (1986), p. 42.
[1156] On authority and disobedience, see Shapiro, "Authority" (2002), p. 385. Unlike here, he claims that authority leaves no room for disobedience.

until the succeeding caliph al-Mutawakkil removed him from office in 235/849-850, and thus served in total at least a decade.[1157]

f. Conclusion: Consultation During Litigation

Three types of consultations during litigation can be assessed. First, consultation occurred when judge and jurisconsult were of different school adherence and when they needed to complement their legal knowledge with the knowledge of the law school that dominated in their local jurisdiction. Second, consultation was also practiced when judge and jurisconsult were of the same law school, and that law school was also dominant in the local jurisdiction. Yet, the case the judge had to decide posed juridical questions that authoritative sources and methods alone could not provide an easy or an exclusive answer to the problem. In this case, the judge sought legal validation and backing through the jurisconsult. A third type of consultation was documented when cases with political overtones affecting the legitimacy of the ruling powers and/or crimes punishable by death penalty were at stake. In this case, validation was sought through jurisconsults, so that the burden of adjudication could be shared and so that the judge would not need to stand alone with the responsibility (and irreversibility in the case of death penalty) of a heavy, and publically particularly observed punishment.

4. Instances of Appeal: Jurisconsults Assessing the Judge's Rulings

In another category, judge and jurisconsult encounter each other at the court of complaints (*mazālim*), which is the court presided over by the caliph himself[1158] or his political representatives. The political rulers, it should be stressed, generally did not intervene in the *qāḍī's* jurisprudence except in matters relating to public order – this is when they convened in the *mazālim* court.[1159]

Mazālim jurisdiction was primarily designed to maintain public order, as an informal court of appeal.[1160] Therefore, *mazālim* involved dealing with complaints against the adjudication of the *qāḍīs* themselves: if it was perceived that the *qāḍī's* or any other legal

[1157] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 191, 194.
[1158] Zaman, *Religion and Politics* (1997), p. 104.
[1159] Vikør, *Between God and the Sultan* (2005), p. 191.
[1160] Though they seem to have played an important role in practice, the *mazālim* courts were largely ignored in the *adab al-qāḍī* literature, and do not find attention in and for themselves in the judicial chronicles either. Only when a case has previously been discussed at a *qāḍī* court, is the *mazālim* court mentioned in the judicial chronicles. Possibly, they were not seen as a regular court because mazālim courts do not adopt the same strict rules of procedure as *qāḍī* courts, and possibly, because they do not fall under the direct control of the *qāḍī*. See Schneider, *Das Bild des Richters* (1990), p. 242; Vikør, *Between God and the Sultan* (2005), p. 191.

authorities' judgment was unfair, one could appeal to the caliph for justice. The caliph's involvement as the highest judicial authority in the jurisconsults' councils remains multifaceted. As *Zaman* sums up "Whether he himself decided, or participated in the *fuqahā's* [jurists'] deliberations, or had the latter alone give their verdict, or chose from their conflicting advice, the caliph in theory, and possibly in practice was part of the process whereby such problems might be resolved and answered."[1161] Typically, a circle of legal scholars would then sit over the judge. The *mazālim* jurisdiction thus opened the possibility for jurisconsults to review the judgment of a *qāḍī*. Compared to previous cases of jurisconsults' engagement with adjudication, the *mazālim* procedure itself is initiated by the litigant.

a. The Jurisconsults Confirming the *Qāḍī's* Judgment

The following case illustrates the roles of the legal authorities involved, and the jurisconsults' final say in adjudication.

ʿAbd al-Majīd, patron (*mawlā*) of Banī Qushayr was discontent with the verdict pronounced against him by Basran *qāḍī* Ubayd Allāh b. al-Ḥasan (d. 168/785), himself a legal scholar and even teacher to later *qāḍī* al-Ansārī.[1162] The litigant ʿAbd al-Majid complained to the caliph that he was wronged by the judge. Caliph al-Mahdī ordered the governor of Basra to unite the jurists (*fuqahā*) to examine if the judgment of the *qāḍī* was fair. If the judgment was right, it should be enforced. They looked into it and found it to be right, and the caliph affirmed the judgment. The litigant was informed and accepted the verdict. [1163]

The case was brought to the attention of the caliph by the litigant himself who felt that the *qāḍī* did not serve his sense of justice; it was not initiated by the jurisconsults. In this case, the jurisconsults confirmed the judge's verdict in accordance with their own standards. The case involves no different school adherence and no legal theme that was obviously and particularly sensitive. The jurisconsults of Basra gathered and examined a judgment that was issued by a Basran judge-and they found the judgment to be right.

From the judge's perspective, the *mazālim* jurisdiction gives the jurisconsults the authority to look into the case, initiated by the litigant and at the demand of the caliph, and to assess the *qāḍī's* adjudication. Caliph al-Mahdī controlled the activity of the *qāḍī*

[1161] Zaman, *Religion and Politics* (1997), p. 104.
[1162] Melchert, *The Formation* (1997), p. 42.
[1163] Wakīʿ, *Akhbār al-quḍāt*, II, p. 96.

by subjecting him to the judgment of the scholars and, despite being the highest judicial authority in the Empire, opted to refrain himself from deciding the case.[1164] He much rather left the jurisconsults to judge the judge- a reflection of the superior authority of the jurisconsults over the judge, in the instances of appeal.

b. Jurisconsults Assessing Mistake of Judge: Resignation of a Judge

Almost a century later, caliph al-Mutawakkil invoked the jurisconsults to give a ruling on a judgment of Egyptian *qāḍī* al-Ḥārith b. Miskīn (judge from 237-245/851-859, d. 250/864).[1165]

The "house of the elephant" case, already addressed above, seems to have been difficult and doctrinally disputed, as the case did not find its end here but was in total brought to court by six generations, and adjudicated by six successive judges, some adhering to Mālikī, and others Ḥanafī school teachings. The case started first with *qāḍī* Khayr b. Nuʿaym, was filed again around 168 when Mufaḍḍāl sat over it and ended in 237/851 when *qāḍī* al-Ḥarīth b. Miskīn and ended up in the *mazālim* court, or the court of appeals so to speak. The school divergence, especially between the Ḥanafī and the Mālikī school, turned out be decisive in Egypt where the Ḥanafī law was considered foreign to the local legal school and customs. Ḥanafī jurisconsults and a Mālikī judge are central actors in this case. Crucially, it shows how the jurisconsults' unilateral evaluation of the case eventually leads to the *qāḍī* resigning from adjudication.

[In a previous and long-winding legal dispute of property rights, endowment and inheritance, affecting the right to use the house, judge al-Ḥārith had annulled (*fasakha*) a previous judgment by his predecessor *qāḍī* Ibn Abī Laith, with the consequence that the family of Sā'īḥ (Banū al-Sā'iḥ) had to clear the house. Family member Isḥāq b. Ibrahīm b. al-Sā'iḥ went to caliph al-Mutawakkil and petitioned against *qāḍī* al-Ḥārith b. Miskīn, claiming that he has done him unjustice and he took his case to Iraq. Caliph al-Mutwakkil ordered the presence of the jurists (*fuqahā'*) and they examined (*nadharū*) his case. The jurisconsults found errors of al-Ḥārith b. al-Miskīn[1166], and they started talking badly about the judge. And the jurists (*fuqahā'*) who examined the case of judge al-Ḥarīth (*nadharū fi qaḍiyatihi*) were Kufans, [i.e. Ḥanafīs]. The judgment of al-Ḥārith, however was based on the madhhab of the people of Medina. And when al-Ḥārith received the news of what had happened [in the

[1164] Tillier, *Les Cadis* (2009), p. 591.
[1165] Ibn Ḥajar, *Raf'al-iṣr*, p. 124 in Kindī, *Kitāb al-Wulāh*, pp. 472 ; Kindī, *Kitāb al-Wulāh,* pp. 475, 502, 504. The case is translated into French by Tillier, *Vies de cadis de Miṣr* (2002), p. 51. Al-Ḥārith ibn Miskīn was a scholar in his own right, he had students coming to study with him the Mālikī teachings. Kindī, *Kitāb al-Wulāh*, p. 502; Al-Khatīb al-Baghdadi, *Tā'rīkh Baghdad*, XIV, p. 283; Melchert, *The Formation* (1997), p. 170.
[1166] Kindī, *Kitāb al-Wulāh*, p. 474.

mazālim courts] he wrote requesting to resign from adjudication. His resignation was accepted by the caliph.[1167]

The case shows that it is not only the litigant's fate that was being decided but also the *qāḍī's*: The jurisconsults' assessment that the *qāḍi* made a legal mistake, or likely just applied his law school doctrine that the jurisconsults disapproved of[1168], did not lead to the *qāḍī* being removed from office by the caliph.[1169] Yet, the *qāḍī* himself requested to resign from office, leaving us only with speculations about how "voluntary" this move was[1170], or in how far, the damage done to his reputation, as a *qaḍī*, or jurist, necessitated this step from the judge's perspective. After all, the jurisconsults started to "speak badly about the judge" and must, in some way, have attacked his professional integrity. Law school adherence, and especially divergence between jurisconsults and judge, turned out to be crucial in assessing this case. But the severe blow to the authority of the judge came from unsettling him by the concerted authority of jurisconsults on appeal. The jurisconsults' authority proved to be potent enough to overturn the judge's verdict and to make the judge decide to leave adjudication. The signal of this case is clear: a judge needs to fear the involvement of the jurists, like in the *mazālim* jurisdiction, to have serious consequences, of losing his reputation and his job. Therefore, the judge needs to be in anticipation of the jurisconsults.

c. Jurisconsults Confirmed Mistake of Judge Based on Legal Discretion (Ra'y)

In the subsequent case, the caliph himself presided over the trial of a judge and led the inquiry into the case. The caliph invoked a council of jurisconsults to be present during the trial. The case is of particular interest, as the jurists had to evaluate a judge's application of the principle of legal discretion (*ra'y*). In Khaṣṣāf's normative passage on the tasks of judge and jurisconscult in adjudication, the possibility of legal discretion (ra'y) is explicitly refered to as an instance that encourages judicial consultation.[1171]

[1167] Kindī, *Kitāb al-Wulāh*, pp. 474-475. On the case of "House of Elephant" as an example of school rivalry see also Coulson, *A History of Islamic law*, p. 88.
[1168] In fact, succeeding judge "Bakkār felt uncomfortable to annul the verdict of al-Ḥārith since [all al-Ḥarīth had done was to] base his verdict on the madhhab of the people of Medina." Kindī, *Kitāb al-Wulāh*, p. 475.
[1169] According to another report thought, Al-Mutawakkil ordered Jaʿfar b. ʿAbd al-Wāhīd who was then qāḍī al-quḍāt to dismiss al-Ḥārith from adjudication in Egypt. Jaʿfar, chief justice, wrote to him and dismissed al-Ḥārith and appointed Duhaym instead of him. Kindī, *Kitāb al-Wulāh*, p. 504.
[1170] See Hale, on coercion in voluntary acts, in this Chapter Three, I.2.a.jj in the case of the "voluntary" resignation of judge al-Ḥassan b. Ziyād.
[1171] On judicial consultation in cases that require discretionary opinion (*ra'y*), see Chapter Two, V.2.

Whether the *qāḍī* sought consultation when he first decided the case is not mentioned. In the instance of revision, the judge's application of *ra'y* is central though.

Though it is in fact the caliph examining and sentencing the judge, the jurists are requested to sit with the caliph over the judge, and thus to function as jurisconsults, i.e. to give their legal opinion on a legal question. However, the caliph keeps the reins firmly in hand—the jurisconsults (the source literally says jurists, *fuqahā'*) are extras more than actors in the caliph's performance of authority. In this examination the caliph mentions fifteen errors that he detected in the judgment and proceeds to question judge Bishr b. al-Walīd al-Kindī (appointed in 208/823) in front of his learned colleagues.[1172]

[Judge] Bishr b. al-Walīd al-Kindī, the *qāḍī* of [caliph] al-Mā' mūn in Baghdad, had whipped a man accused of having insulted [former caliphs] Abu Bakr and ʿUmar, and inflicted on him a defamatory promenade on a camel. […]

- Bishr! he says. Why did you apply the Qur'ānically prescribed punishment (*ḥadd*) against this man?

- For having insulted Abū Bakr and ʿUmar, he answered.

- Did his adversaries come to find you?

- No.

- Did they then send you any authorised representatives (*wakīl*)?

- No.

- Can the judge (*ḥakīm*) apply the *ḥadd* punishment to an accused, without the presence of any adversary?

- No.

- And you were certain that no one would give him his share back, which would have rendered the *ḥadd* punishment null and void?[1173]

- No.

- Were the mothers of two [caliphs] faithless or Muslim? [1174]

- Faithless.

- And does one apply the *ḥadd* punishment for the faithless in the same way as for the Muslim?

- No.

- Let us assume that you acted to return justice to Abū Bakr and ʿUmar: did two honourable witnesses give evidence in front of you?

- One of two agreed to.

[1172] Wakīʿ, *Akhbār al-quḍāt*, III, p. 272.
[1173] Original unclear.
[1174] Caliphs Abū Bakr and ʿUmar were insulted through their mothers, most likely as "sons of prostitutes". The accused is thus charged with having committed the crime of defamation of fornication (*qadhf*) as they blame the mothers of having committed fornication (*zina*), see Tillier, *Les Cadis* (2009), p. 601.

- Does one apply the *ḥadd* without the sworn statement of two honourable witnesses?

- No.

- You moreover applied the *ḥadd* punishment in [the month of] Ramaḍān. Are *ḥudūd* punishments (pl. of *ḥadd*) applied in the month of Ramaḍān?

- No.

- You whipped him while he stood. Does one make stand up those convicted to the *ḥadd* punishment?

- No.

- You also tied him to a pillar. Does one tie a convicted of *ḥadd*?

- No.

- Then you made him sit on a camel and you have made him suffer a defamatory promenade. Does one let promenade a convicted of *ḥadd*?

- No.

- Having applied the *ḥadd*, you have imprisoned him. Do we imprison a convict after the *ḥadd* punishment has been executed?

- No.

- I neither take the responsability of your sin before God, nor will I join your crime. Undress him and bring the convict of the *ḥadd*, so that justice will be served!

- The jurists present said to him:

Praise to God who made you a performer of His rights and an expert in His law!

You say the truth (*al-ḥaqq*), you put it into practice, you order according to justice and you correct who moves away from it. This man, Commander of the Faithful, is a judge who employed his legal discretion (*ra'y*) seriously and who made a mistake. Do not throw the dishonour on all judges and do not dishonour adjudication because of him!

- [Caliph Al-Maʿmūn] ordered therefore that they arrest him and he was imprisoned in his home up until his death [lowering the proposed penalty] [1175]

The incident can surely be read in many ways. It has mostly been read to highlight the relationship of the caliph to his judges and leading jurists during the *miḥna* (lit. trial) period, when the caliph aspired to manifest their subordination to his political and legal authority.

In 218/833, sensing that the dogmatic authority of the caliphate was threatened by the increasing power of "people of *ḥadīth*" (*ahl al-ḥadīth)*, caliph al-Maʿmūn instituted a "test" (*miḥna*) intended to examine the position of the most important jurists and traditionists of the empire vis-a-vis the doctrine of the creation of the Qur'ān defended by

[1175] Al-Yaʿqūbī, *Ta'rīkh*, II, p. 329. According to Wakīʿ, *Akhbār al-quḍāt*, III, p. 273 Bishr was removed from office because he was disobidient to chief justice Yaḥya b. Aktham. Tillier, *Les Cadis* (2009), p. 601.

number of theologians, among which many were Muʿtazilites.[1176] The *miḥna* focused on a theological question that the Abbasids turned into a state dogma: That the political and religious authority was conferred to the Abbasid caliphs by God implicated the obedience of all their subjects – and particularly their civil servants.[1177] During that time, the majority of judges and jurists were pressured to bow to caliphal authority and to accept the createdness of the Qur'ān as theological principle.[1178]

The important political theme had a tangible influence on the situation between judge and jurisconsult. Rather, all civil servants and a great many number of (independent) jurists were tested by the caliphs whether they adhered to the createdness dogma and were consequently removed or sanctiond in other ways. Thus, though the *miḥna* affected the relationship of the caliph to the judges and jurists, it did not seem to have affected the relation between judges and jurists.

In this sense, this case is politically highly sensitive and has much more to offer than (merely) the question of authority of judges and jurisconsults. This is demonstrated by the fact that in this case the caliph himself questioned the judge in the *mazālim* court, and left the jurisconsults merely the possibility to applaud him by confirming his legal findings. Still, the role of the jurists as witnesses, rather than judges themselves, shows that the caliph is eager to have them attend the court case, and to give his finding an additional layer of legitimacy.

For our purpose, it is central that the jurisconsults confirmed that the judge had misapplied the legal principle of legal discretion (*ra'y*) and independent legal reasoning (*ijtihād*). The case revealed the underlying uncertainty in the central legal themes of the laws of testimony, and the laws of criminal law in the case of defamation (*qadhf*) as an Islamically prescribed crime (*ḥadd*). This time it is the caliph examining the judge, making sure the jurists are witnesses to the case, and giving their final, if only symbolic, agreement to present the errors of the judge and to dismiss him from office—looking for acclamation more than consultation.

[1176] Tillier, *Les Cadis* (2009), p. 602. As the Ḥanafī jurists largely leaned towards Muʿtazilite theology and philosophy, they largely sided with the createdness dogma which might explain the preference of Abbasids for the Ḥanafīs in the judicial system. A substantial number of Hanafīs though rejected the idea of the createdness and were sanctioned by imprisonment, or else. One of them is the judge out on trial, Bishr b. b. al-Walīd al-Kindī. See also Melchert, *The Formation* (1997), p. 55.
[1177] Tillier, *Les Cadis* (2009), p. 604.
[1178] Tillier, *Les Cadis* (2009), p. 604.

It would be misleading to assume that maybe judge Bishr was an incompetent judge who made fifteen obvious mistakes in one case. The political background of the *miḥna* hints at a show trial demonstrating how the caliph stressing his authority over the judges. This would explain why the judge confirms all mistakes he is being blamed for. Significantly though, the lack of authoritative sources on the questions of criminal law gave the judge much more leeway than judge and jurisconsults were willing to concede in the presence of this caliph. Though we do not know anything about how the case was discussed in the first trial, it can be at least confirmed that Bishr was a highly competent jurist: Bishr b. al-Walīd al-Kindī (d. 238/852-853) studied under eminent Ḥanafī jurist and later chief justice *qāḍī al-qūḍāt* Abū Yūsuf[1179], and thus was familiar with Ḥanafī legal thought. In fact, the jurisconsults confirmed that Bishr "employed his legal discretion (*ra'y*) seriously" but in doing so made mistakes. It is unclear in how far this case, despite its legal core discussing the crime of defamation (*qadhf*), was rather of a political nature, as Bishr himself lost his judgeship and was briefly imprisoned for refusing to confess that the Qur'ān was created. [1180]

d. Conclusion: Consultation in Cases of Appeal

The *mazālim* courts illustrate that even after the judges had dispensed justice, jurisconsults, this time on an imperial level rather than a local one, could nevertheless excert their authority over the judges, assessing the disputed judgment in particular, and the judge's adjudication and sometimes fate in general. The *mazālim* court was thus in effect a way for the jurisconsults, and the caliph in the first place, to control the judges, even though only to the extent brought forward by a litigant. This way, *Konsultativjustiz*[1181] as practiced in the *mazālim* jurisdiction functioned also as a vertical reviewing authority that excercised control over the judges.

While in the cases of removal, jurists used the caliph's political-legal authority to exercise authority and power over the judges, the *mazālim* courts demonstrate how the caliph uses the jurists' legal authority over the judges to affirm and strengthen his own central power.

[1179] Ibn Abī al-Wafā', I, p. 166; Melchert, *The Formation* (1997), p. 36.
[1180] Melchert, *The Formation* (1997), p. 55.
[1181] Becker, *Islamstudien* (1932), II, p. 313.

II. Creating Authority through Cooperation and Confrontation

The cases presented raise the challenge to cautiously conclude how representative they were for a general assessment of authority between judge and jurisconsult. It is difficult to determine whether the cases were recorded because they were considered ordinary or not. However typical or atypical these cases may be, they can nevertheless serve in helping to understand better the creating of authority in a legal order that does not stress institutionalized legal hierarchy.[1182] The absence of institutionalized hierarchy and of clear demarcation lines of legal authorities vis-à-vis each other, did not mean however, that structures of authority and hierarchy did not exist nevertheless. Rather, they need to be cautiously reconstructed through the encounters of cooperation and confrontation. By now responding to the questions of *who*, *when*, *how*, *where*, *what about* and *with what argument* some remarks on creating authority between judge and jurisconsult as legal authorities from an empirical perspective can now be made.

1. Who: Single and Collective Authority/ies

In pre-modern Islamic legal history, courts were constituted of a single judge. There was no bench, no collegium of judges, no jury or assembly system. The judge had his staff, assisting in the preparation of the judgment but he was always alone responsible for adjudication in his local jurisdiction. The judge thus always acts as a single authority. The judge derived this authority through his function as judge, i.e. dispensing justice in contradictorial cases that he terminates through his decision, through his appointment by the highest judicial, political and religious authority, the caliph, and, often, by being a scholar of law himself.

Jurisconsults are first and foremost legal scholars. When solicited *by* the judiciary or *on* a judicial question (like appointments and removals of judges), I call them jurisconsults. I decided to keep calling them jurisconsults when the legal scholars unsolicitly voiced their opinion on questions of the law or the judiciary, i.e. when strictly speaking they are not consulting but imposing their opinion. Some jurisconsults did not have an explicitly or exclusively legal background but always a scholarly background. For instance, some of the jurisconsults were called experts of *ḥadīth*. *Ḥadīth* as precedential reports are a main source of normativity for both the legal and religious field. Whether the *ḥadīth*

[1182] See for example Mottahede, *Loyalty and Leadership* (1980) on understanding Islamic culture on its own terms of little institutionalized hierarchies.

expert was rather a scholar of law or of religion thus cannot be exclusively determined. Therefore, it shall suffice to qualify as a jurisconsult whoever opinionates on the judiciary and on adjudication. Having qualified the background of the jurisconsults, the overwhelming majority had a clearly identifiable legal background and was identified as jurists (*fuqahā'*).

In theory and practice, jurisconsults could issue their opinions both alone, that is, as a single authority, as well as jointly with other legal scholars, that is, as a collective authority. The jurisconsults in some cases sat similar to what Tyan calls the *qāḍī's* "consilium".[1183] Both modes of giving advice were documented in the judicial chronicles. The judge could thus be faced in some cases with an unincorporated body of jurisconsults who were engaged in a horizontal discourse *inter se* as well as with the judge. When judges sought consultation from such a "consilium," they did so largely to seek refuge behind the collective authority of other jurists—jurisconsults—whose consensus would have a greater legitimacy than the judgment of the single judge. This for instance was the case of judge Makhzūmī, the first Ḥanafī judge to be appointed to the Iraqi city of Basra with its own, distinct legal tradition.[1184] At times, more jurisconsults also meant more authority.

When judges reached out to single jurisconsults, they did so knowing of their individual prestige as eminent jurists which in itself carries substantial authority, and/or because of the jointly shared law school affiliation[1185] or by reason of the jurisconsult's local legal expertise.[1186] The collective authority of the jurisconsults becomes manifest also in other ways: they also appeared as joint delegations before the caliph, stating clearly who they wanted as judge and who they did not want, demonstrating a joint, collective stand. Especially when they managed to speak with one voice, they often succeeded in affecting the make-up of the judiciary – especially with removals but also with nominations. Accumulating their voices before the caliph was one way to mark the jurisconsults' collective authority, also, indirectly, towards the judge. Their horizontal authority toward the judge was then, via the caliph, transformed into a vertical, asymmetrical authority.

[1183] On the *qāḍī's* "consilium" as Emile Tyan calls it, see Tyan, *Histoire de l'organization* (1960), pp. 214-216.
[1184] See the incident of judge Mahkzūmī deferring his case to a consilium of jurisconsults, Chapter Three I.3.a.
[1185] See judge Al-Mufaḍḍāl b. Faḍālah reaching out to emminent jurisconsult Mālik b. Anas who shared the same law school as the judge, Chapter I. 3.c. and d.
[1186] See the case of Ḥanafī judge Bakkār reaching out to two local jurisconsults familiar with Māliki law in Egypt, Chapter I.3.b.

Also, the single jurist critizing the judge carried high recognition and authority, the more the jurist was a recognized expert of law.

In the *mazālim* jurisdiction, the jurisconsults as a collective body examined the *qāḍī's* judgment, initiated by the litigant and at the demand of the caliph. While horizontally advising the caliph, the jurisconsults thereby also acted as a vertical instrument of control in relation to the judge. They controlled the "correct" application of Islamic law as defined by the doctrines of their school.

The authority of the jurisconsult, collective or single, could also go back to a social and legal community support, which possibly enhanced authority in a number of ways. When the jurisconsults could rely on community consensus and solidarity, they were provided with a significant leverage to those who otherwise would be unable to oppose the actions of others, lacking the access to force themselves, like the jurisconsults. Those with no formal, or official authority could act authoritatively if they had sufficient support from the local community, social and legal.[1187]

To a certain extent, the judge's authority also relied on community support, and the caliph who could be swayed by the (legal) community: was his adjudication considered foreign to the local school and custom, the community of legal scholars and the population could turn against the judge, see also below the local aspect of authority ("where"). Given that there was no fixed tenure for the judiciary, lack of community support could result in the judge's removal. For the rulers, judicial administration also needed stability, not turmoil over the judiciary.

An individual's authority could erode quickly when his supporters decided he was no longer worthy of their support. This principle held even for those in positions of formal, official or caliphal authority. Just as those with official authority would lose support if they alienated their subordinates, those with no formal authority could become authoritative when people decided to support them.[1188]

Similarly, the jurisconsults' support was based on their support by the legal and the local community. Community support enhanced the jurisconsults authority in a number of ways. Community consensus and solidarity provided significant leverage to the jurisconsults who otherwise would be unable to oppose the actions of others, lacking the

[1187] Similarly, Nelville, *Authority in Byzantine Provincial Society* (2004), p. 4.
[1188] Nelville, *Authority in Byzantine Provincial Society* (2004), p. 4.

access of force themselves. Those with no formal or official authority could act authoritatively precisely because they had sufficient support from local people.

Maintaining oneself in a position of authority therefore required constant performance before an audience of potential supporters. In an idealized way, the scholars represented the ideal of piety, morality and integrity. [1189] In any society, authority is augmented through respect and admiration[1190] and those with no formal authority could become authoritative when people decided to support them.[1191] The jurisconsults' authority was constituted in part through their popularity with the population, so that the community was a source of authority.

Both judges and jurisconsults maintained their authority through the support of others. They both attempted to gain authority by gathering the support of community opinion. For the judge it was particularly important to gain the support of community opinion, in particular of the legal scholars, because only in this way could he be assured that he would gain the caliphs' support. The jurisconsult in that regard was less dependent on either the community of the caliph. But to make himself heard and to affect adjudication he did make use of the collectivity of his colleagues: presenting themselves as delegations to the caliph or councils appearing next to caliph was a particularly efficient way of affecting adjudication.

2. When: Authority Before, During, and After Moments of Law-Making

Judges and jurisconsults encountered each other in different phases of adjudication. The time phases started with the jurisconsults' effect on the making or breaking of the judiciary. Jurisconsults, representing the community of local legal scholars, often were solicited by political authorities over who should be appointed judge in their local jurisdiction. During litigation, consultation was documented either in requesting advice on a law school other than the judge's or for legal questions not obviously covered by the authoritative sources, and not canonized and finalized by school opinion. Another reason for seeking consultation during litigation was the legitimacy and validity sought by the collectivity of jurisconsults. This way, the burden of adjudication was shared, in particularly difficult cases or cases involving irreversible punishments like the death

[1189] See for example Hallaq, *Origins* (2005), p. 180, 183.
[1190] Nelville, *Authority in Byzantine Provincial Society* (2004), p. 4.
[1191] Nelville, *Authority in Byzantine Provincial Society* (2004) p. 4.

penalty. Even after litigation was over, instances of appeal could still open the door for jurisconsults evaluating the adjudication of a judge at the invitation of the caliph, so that a judge would still have to submit to the authority of the jurisconsult after he had previously dispensed justice. Finally, jurisconsults could affect the removal of judges by appealing to the caliph, for reasons of different understanding and interpretation of the law, or for what jurisconsults considered wrongful and immoral behavior harming the professional integrity of the judiciary.

Jurisconsults thus could affect adjudication before, during and after the adjudicative decision-making of the judge, before the judgment was taken.The judge was never safe from the community of scholarly peers who were constantly watching his judicial and social performance, and were possibly competing for the same job.

3. How: Advice With, Without or Against the Will of the Judge

Consultation came in various forms, solicited and initiated by the judge, volunteered by the jurisconsult, or requested by the caliph, and thus with, without or against the will of the judge.

When consultation was initiated by the judge, the judge sought particular people for their advice. The skills, competence and trustworthiness of the counsel seem to have been known or researched in advance by the judge. The judge either sought to complement his legal knowledge as informed by his law school and thus solicited advice from jurisconsults belonging to the differing dominant local law school, like the case of Ḥanafī judge Bakkār when he requests advice from Māliki jurisconsults in Egypt. Or the judge sought to supplement his knowledge by referring to a council of either local jurisconsults or jurisconsults affiliated with the caliph, like Ḥanafī judge Makhzūmī referring to the authority of jurists from Basra or the caliphal council of jurisconsults.

Iniatiting consultation when judge and jurisconsult belong to the same law school showed that in some instances the cases could not be solved by “simply” deriving the law from authoritative sources or methods, but needed consultation because there was uncertainty in law. Exemplarly cases were the laws of endowments and the laws of blasphemy, as Mālikī judge Mufaḍḍal in his correspondence with law school eponym Mālik b. Anas shows. Seeking advice from a jurisconsult who belongs to the same school could also prove useful when the judge applied the law in a jurisdiction that locally differed in the legal problems it faced: It seems that the Medinan society and the

Baghdadi society engaged in law differently, in a way unfamiliar to the judge, as the puzzlement of Medinan judge Yaḥyā in Baghdad demonstrated.[1192] In the case of Iraqi judge Bakkār in Egypt, it is likely that the judge obeyed the jurisconsults' advice as a matter of self-interest and because he recognized the jurisconsults' superior knowledge, or at least this ascription that lends the jurisconsults legitimacy. When the judges thus willingly sought the advice of jurisconsults, the cases documented suggest that they tended to also adopt the advice.[1193]

"Vertical consultation," in the instances of review (*mazālim* jurisdiction), involves advice given without the will of the judge, acting as supreme justice. In this case, the judge had already dispensed justice and is not expecting a later intervention, a later assessment of his judgment. Because of the imperial significance and caliphal validation given to the *mazālim* jurisdiction, the judge cannot reject the jurisconsults' assessment of his judgment.[1194]

Jurisconsults also gave their legal opinion without either the judge (or the caliph) soliciting it. The legal opinion then was rather a way of control than a means of transmitting additional knowledge to deepen the legal foundation for the judgment or to provide a broader legitimacy and validation for the judgment—to the contrary. An example of advice against the authority of the judge is the instance of jurisconsult Abū Ḥanīfa who issued a *fatwā* to qāḍī Ibn Abī Layla, critizising his judgment. The advice was not requested or initiated by the judge, and instead was imposed on him. Also the delegation of jurisconsults that appeared before the caliph often acted against the will of the judge, at least the judges that they sought to remove from office.

4. Where: Authority between Local and Foreign, Province and Center

The authority relation between judge and jurisconsult was affected by the dynamics of legal thought spreading through adjudication in a plural legal system. Invested with authority and force, adjudication was a legal instrument that could unsettle the stability of the community, as the jurisconsults were well aware. It therefore mattered whether the

[1192] See when judge Yaḥyā admitted feeling foreign to the legal problems of the Baghdadi litigants, Chapter Three, I.1.a.dd.
[1193] Though not always, as the death penalty case reveals, see Chapter Three, I.3.e. (capital punishment case in Kufa).
[1194] The mazālim jurisdiction could also be seen as an advice to the caliph, acting as supreme caliph. In this case the authoritative relationship to the caliph is horizontal, yet to the judge the authority remains vertical.

judge was from the local legal fabric, or sent to serve in a community that followed a different law school than the judge.[1195]

The controversies about legal matters, and the enmity they produced, were particularly frequent in Egypt at that period. The Mālikī jurist Ibn al-Munkadir, for example, accused eponym al-Shāfiʿī, who established a new legal school in Egypt, of splitting the once united legal community.[1196] Similarly, when judges came from outside the city, it was feared that they would bring with them legal doctrines that were unfamiliar and that had an unwanted effect on the local community. Previously, similar disputes occurred between the newly introduced Ḥanafī and the locally prevalent Mālikī understandings on property rights in Egypt.[1197] The dispute between the local and the foreign was embodied in the judge coming from outside, a change in jurisdiction was assumed which in fact often caused friction and dissatisfaction between the jurisconsults and the judge.

Jurisconsults pushed for judges from their own local legal community. It seems that an overlap in law school and in local origin led to less friction and less encounters between judges and jurisconsults. When judges came from outside, they encountered more opposition—and more consultation, with or against against their will. Some nevertheless could not stay in office for long, like Ḥanafī judge Makhzūmī in Basra who had to leave after four months, even though he had requested the advice of the Basran jurisconsults as well as the jurisconsults of Baghdad. Judges adhering to law schools unfamiliar with in the local jurisdiction were only gradually welcomed when the judge's law school started to adopt some of the local legal traditions into its teaching. For instance, Ḥanafī judges in Basra were increasingly appointed and could increasingly succeed when Ḥanafī teaching in Basra adopted some of the Basran legal thoughts.

With the Abbasids, a gradual change in their appointment policy of judges could be observed, affecting the locality of the post of the *qāḍī*, especially by the second half of the third century (865-912).[1198] In the Iraqi city of Basra, for instance, the *qāḍī* was for a long time selected from the Basran candidates presented by the town's local legal community to the city of Basra. He was often a local legal scholar of the town himself, knew his peer legal scholars and many of the residents in person and was subject to their

[1195] On the centralization of the judiciary and the preference of Abbasid rulers first for Mālikī-Medinan, later for Ḥanafī-Iraqi judges that lead to the sending out of judges to different parts of the Empire, see Chapter Four III.1.e.
[1196] Kindī, *Kitāb al-Wulāh*, p. 438.
[1197] Kindī, *Kitāb al-Wulāh*, pp. 474-475.
[1198] Tsafrir, *The History* (2004), p. 37

criticism. His jurisdiction was limited to the city. The dissatisfaction of the local scholars and the population could lead to his dismissal. In the second half of the third century, however, the position of the *qāḍī* had become less closely connected to the situation of Basra. The *qāḍīs* were no longer chosen from among the legal community of the city but were rather people sent to Basra from outside and were not part of the local fabric anymore.[1199] This lead to (real or imagined) "innovations" being introduced and critized, or even rebelled against, as "foreign".

Both in the Egyptian provinces as well as in the Iraqi provinces with a distinct legal tradition (i.e. prior to Ḥanafī dominance), the local legal community was eager not to have the central political powers imposing a judge on them whose law school was considered foreign to the locals. So in fact what was a struggle of the province vis-à-vis the Abbasid central power was in fact bound up to law school, diverging doctrine and increasing Abbasid preference for Ḥanafī justices.

Nevertheless, space was a dimension of authority. Territorial space and territorial distance influenced the leeway of the local community as much as the vulnerability of the judge, especially when he was sent to his jurisdiction from outside, and had to establish his authority as a foreigner to the locality. As state functionary, judges must have known that they needed to keep such far away, yet wealthy provinces like Egypt satisfied to guarantee the province's and the Empire's stability, as well as to maintain their job.

Space was no hindrance to request consultation from outside the locality. A judge would request consultation from a jurisconsult outside his judicial jurisdiction, like a judge in Egypt or Basra requesting advice from Medina or from Baghdad. They did so in writing, or had the consultant coming to join them, or the case transferred to the imperial capital. So space (and time) was not a hurdle for some extrajudicial share in adjudication.

[1199] Somewhat later, the situation in Basra changed yet again and the judges were sent because of their high standing at the Abbasid caliphal court. The jurisdiction of one *qāḍī* usually encompassed more than one town, sometimes upt to three or four towns or districts, and a *qāḍī* did not usually reside in the town to which he was appointed. The qāḍī of Basra did not live there but in Baghdad and appointed delegates to Basra, Tsafrir, *The History* (2004), p. 37. *Tillier*, however, points out that it is true that those carrying the official title of qāḍī were not representatives of the local legal fabric and that they did not sit with their approval, with respect to the cities Basra, Kufa and Wasit. The answer is less categorical, so Tillier, however, if one considers that these *qāḍīs*, in practice, did not actually practice justice in their jurisdictions or even put a foot there: the judiciary became a honorary title, emptied of a large part of its competences and activities. On the ground, justice was spoken by vice-judges (*khalīfas* or *nā'ibs*), delegates of the official *qāḍī* of which we do not know much, but some of which were natives of their cities, possibly to allow for a stable adjudication, Tillier, *Les Cadis* (2009), p. 185. On vice-judges see also Kassassbeh, *The Office of Qāḍī* (1990), p. 291.

5. What About: Legal Themes—Property, Procedure, and Capital Punishment

As a general rule the jurisdiction of the *qāḍī* court covered cases of family law, inheritance, civil transactions and torts, and endowments.[1200] Both the judicial annals by Wakīʿ and al-Kindī show a strong concern for legal cases on commercial matters.[1201] The cases in which most friction with the jurisconsults occurred refer to matters of private law, in particular property, and here in particular endowments and inheritance (a.). Procedural law, especially in relation to the rules of testimony, also involved sensitive issues (b.). It is in the field of property and procedure in particular that legal innovations as introduced by adjudication would be much feared by jurisconsults.[1202] Finally, the *qāḍī* court also had jurisdiction over *ḥadd* crimes, which were considered matters of public order; both the political implications and the severity of the punishment made these cases sensitive, which often played into procedural issues (c.).

a. Property: Endowments and Inheritance

Property law seems to have been particularly acute (or at least was well-recorded). Endowments and inheritance rights were a hot topic in court, as adjudication in Egypt as well as the Iraqi city of Basra document. What makes the laws of endowments (*waqf)* so sensitive is that the endowment is established in perpetuity, is irrevocable and must have an ultimate charitable purpose. At the same time, the fund can also termporarily benefit the descendants, which is why endowments and inheritance righs are so closely connected, and why any new legal interpretations of an already complicated set of norms not benefitting the descendants, endangered their material well-being and was met with opposition. Both in Egypt and Basra, local (Mālikī or Basran legal thought) clashed with Ḥanafī law which sought to interpret the laws of endowments so that they could not bypass the laws of successions to the advantage of the descendants, and at the detriment of the poor and needy.[1203] A judge's leaning to a particular school of law thus played a considerable role for the property rights of whole lines of families, and was thus decisive for the economic ordering of a city.

[1200] Coulson, *A History of Islamic Law* (1964), p. 132. See also Khaṣṣāf's *adab al-qāḍī* work covering mostly "private" law questions in his casuistry, Chapter Two, IV.2.
[1201] Tillier, "Women befor the Abbasid Qadi" (2009), p. 294, counting about 215 reports dealing with commercial claims and debts in Wakīʿs chronicle *Akhbār al-quḍāt* (Reports of the Judges).
[1202] See the legal innovations that stirred debate in the case of Ḥanafī judge Masrūq al-Kindī in Mālikī Egypt, touching property and procedure, in this Chapter Three, I.2.b.bb.
[1203] On Ḥanafī restrictions on the law of endowment, see this Chapter Three I.2.a.bb. (as discussed with the case of judge Khālid).

Endowment cases, at least in Egypt, were very much brought before court.[1204] For example, the generations-long Egyptian dispute over a case ("house of the elephant") of endowment and inheritance rights attached to it, kept busy six succeeding judges, and had Ḥanafī and Mālikī judges and jurisconsults each take a different position on the result.[1205] Famous Egyptian jurisconsult Layth b. Saʿd exerted his quasi-coercive authority on Ḥanafī judge Ismaʿīl b. Yasaʿ by requesting the caliph to have the judge removed from office for declaring invalid endowments. The jurisconsult made it clear that he and his fellow legal community would have not opposed the judge for any other decisions but the ones on property.[1206] In Basra, jurisconsults' resistance to the appointment of Ḥanafī judges was similarly related to the feared introduction of laws upsetting the material wealth of those whose rights were connected to endowments. Jurisconsults thus rejected judicial candidates both on doctrinal and on economic grounds, and often preferred a judge from the dominant local school who would not risk upsetting the established economic order. For example, despite the jurisconsults agreeing on the fact that al-Anṣārī was a a judicial candidate who fulfilled the criteria of eligibility as formulated in the *adab al-qāḍī* literature, the delegation of Basran jurisconsults eventually did not recommend him to the caliph for the judiciary: The jurisconsults of Basra feared judicial activism of a Ḥanafī judge in private law, defined by *Duncan Kennedy* as the willingness to change or evolve the law in ways that upset existing patterns of economic and social advantage.[1207] Behind the support for or opposition to a judicial candidate, his law school adherence was indicative for his take on matters of substantial law, in this case, property law.

In the jurisconsults' opposition to and complaints over the judge's ruling on property law, the jurisconsults often clearly refer to the material wealth that would be at stake for (the rich of) the city. Thus, it becomes clear that the legal opinions on property, or more precisely, endowment and inheritance were (regulatory) interventions through which the jurisconsults conditioned the outcomes of economic conflict and wealth distribution.

[1204] See as an example the judicial record of *qāḍī* of Egypt Muḥammad b. Abī Layth (in office from 226-235) who judged over many cases of endowments and also supervised and administered endowments as trustee. Kindī, *Kitāb al-Wulāh*, pp. 449-450, 463-464.

[1205] Ibn Ḥajar, *Raf'al-Iṣr*, p. 124; Kindī, *Kitāb al-Wulāh*, p. 472-475, p. 502.

[1206] On Egyptian Jurist Layth b. Saʿd Requesting Dismissal of Iraqi-Ḥanafī qāḍī Ismaʿīl b. al- Yasaʿ, see this Chapter Three, I. 2.b.aa.

[1207] Kennedy, "Toward an Historical Understanding of Legal Consciousness" (1980), p. 5. On the Basran delegation of jurisconsults and the case of Ḥanafī judicial candidate al-Anṣārī, see this Chapter Three, I.2.a.bb.

b. Procedure: Testimony

Procedural law belonged to the most dynamic fields of the early formative period. The law of testimony was one that brought about a lot of dispute, different schools were establishing diverging rules of testimony. Judges were using their judicial discretion differently in deciding their cases. Judges were involved in the development of legal procedural law and judicial procedure, its modification and its improvement, from their own legal reflexion – which could stem from their reflection as scholars previous to them entering their judicial functions, or from the reality which they noticed from adjudicating, or from scholarly exchange with other, private jurists.[1208]

It seems that the laws of testimony were not applied consistently. Instead, judicial discretion seems to have been the norm. Judicial chronicles (and other genres) confirm what is a captivating subject in legal scholarship: in how far can judicial practice differ—and, presumably, has always differed—from legal doctrine. This is probably where the jurisconsult comes in, to monitor whether the school doctrine is respected and judicial discretion is not overstretched. Thus, in the case of the Basran judge Khālid, the complaints of the jurists to the caliph covered aspects of testimony law, and led to his removal.[1209] *Qāḍī* Makhzūmī in Egypt caused much friction amongst the local community in the field of testimony law because of his legal innovations. Testimony law can be a reflection of who a society considers is a credible witness and who is not: *Qāḍī* Makhẓūmi had refused testimony of a person attending an evening party where frivolous songs were sung. The judge's new moral criterion for the credibility of a witness interfered with the accepted social order. Given that the witness under study was part of the nobility, the judge had also upset the local hierarchy of the community.[1210]

As juristic doctrine on the laws of procedure allowed a considerable diversity, judicial practice throughout the Empire differed substantially.[1211] Whenever a judge diverged from what the jurists considered rightly derived law, it would stir a debate—like in the case of testimony law as applied by judge Khālid. Wakīʿ enumerates many cases of judges applying the laws of testimony according to their legal discretion, differing from

[1208] Tillier, *Les Cadis* (2009), p. 424. Hallaq argues that the contribution of *qāḍīs* in the development of the law, particularly procedural law diminished after the second/ seventh century and that it was especially muftīs and authors of legal treaties which since advanced the evolution of Islamic law. Hallaq, *Authority* (2001), p. 191.
[1209] Discussed as the case of judge Khālid in Chapter Three, I.2.a.bb.
[1210] Ibn Ḥajar, *Raf'a al-'Isr*, p. 127, in Kindī, *Kitāb al-Wulāt*, p. 388.
[1211] Masud, "The Study of Wakīʿ's" (2008), p. 123.

scholarly doctrine. For instance, jurists across the schools did not accept a written document without a testimony, as Islamic courts which placed much more importance on oral testimony. Muslim jurists tended to view written documents with a degree of suspicion as the written word can be manipulated in a manner that the oral testimony of trustworthy persons cannot. Therefore, theoretically, a written document could acquire legal force only through the verification of its contents by the oral testimony which is the decisive factor in determining the existence and nature of any legal action.[1212] The judicial chronicle of Wakīʿ, however, captures also diverging judicial practice, where written testimony was accepted.[1213] The judges' criteria of acceptable witnesses, however, differed from those of jurists[1214] and other judges. This heterogeneity of opinions lead to debates amongst the jurists[1215] and, significantly for this study, jurisconsults critiquing judge's use of the law of testimony. Also, regarding the criteria for refusing a witness, judges differed with each other, and sometimes were in violation of the laws of testimony as established by the jurists.[1216] For example, *qāḍī* Masrūq refused to accept the testimony of one of the nobilities, regarded in high esteem by preceeding Egyptian judges Ghawth and al-Mufaḍḍal and other judges, for his attendance of evening parties with frivolous songs. The judge thereby changed the laws of testimony of who could be a credible witness at court, and was much critized for it by the local jurisconsults. He had disrupted the local fabric of which the local jurisconsults were also part of.[1217]

Judicial discretion on the laws of testimony was widely and considerably practiced[1218], and created friction with the jurisconsults, which in the case of judge Ibn Abī Laylā and jurisconsult Abū Ḥanīfa resulted, also because of other reasons, in an open struggle of public authority.[1219] The laws of procedure thus were applied differently across the judicial board and, at times, against legal doctrine. Testimony in the case of *ḥadd* crime was another scholarly much debated issue and unity in theory and practice was far from

[1212] Johansen, " Formes de langage" (1997), p. 357.
[1213] Wakīʿ, *Akhbār al-quḍāt*, II, p. 11, p. 416; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[1214] Wakīʿ, *Akhbār al-quḍāṭ*, I, p. 146, p. 293, p. 331; II, p. 276; III, p. 117; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[1215] Masud, "The Study of Wakīʿ's" (2008), p. 123.
[1216] Wakīʿ, *Akhbār al-quḍāt*, I, p. 146; II, p. 284; Masud, "The Study of Wakīʿ's" (2008), p. 123.
[1217] On the case of Ḥanafī qāḍī Mazrūq criticized by Egyptian jurisconsults for introducing legal "innovations" in the field of testimony law, see in this Chapter Three,I.2.b.bb.
[1218] Tillier, *Les Cadis* (2009), p. 424.
[1219] See this Chapter Three, I.1.c.

being obtained[1220], and had left ample space and necessity for judicial consultation, as the next section shows.

A standardized Islamic law of procedure did not exist at that time. It is Ibn Muqaffa, the political secretary of the caliph, who will raise this as an argument for codification of the laws of the Empire (see next Chapter Four). With no unified procedural law existing in the Empire, it was the jurists that documented what they consider errors of adjudication, and thus functioned as an instance that determined what the law was. In fact, *muftīs* were increasingly involved in developing the laws of evidence.[1221] Their contribution to and active participation in the legal process in the centuries to come emerged of increasing relevance, as attested in works on positive legal rulings (*furūʿ*) in the chapters dealing with courts and evidence (*kitāb al-aqḍiya wal-shahādāt*).[1222] More significantly, the rules and principles governing the court were the product of *fatwās* which were incorporated into these works. However, it cannot be corroborated if these *fatwās* were made at the request of the judge or initiated and addressed by the *muftī* to the *qāḍī*.

Yet, whenever the jurisconsults criticized the judges for their application of the laws of testimony, they acted as a controlling instance of judges. Though the jurists generally did not want the codification of laws to maintain the legally diverse school traditions, as projected by caliphal secretary Ibn Muqaffa', they nevertheless shared the concern over the uneven application of the laws of procedure according to the judge's discretion, sometimes with little reference to legal doctrine. Possibly, the standardization of the laws of procedure was therefore one aim of controlling the judge's practice of the laws of testimony.

c. Ḥadd Crimes and Capital Punishment

The extrajudicial advice regarding capital punishment may have well served as a validation vis-à-vis the community. This is particularly so with the *ḥadd* crimes, which are considered a violation of public interest. Such crimes are defined as offences with fixed, mandatory punishments that are based on the Qur'ān. They include theft, banditry, unlawful sexual intercourse, an unfounded accusation of unlawful sexual intercourse

[1220] For a variety of scholarly debates on testimony between Ḥanafī, Shāfiʿī, Mālikī and Ḥanbalī scholars, see Rabb, *Doubt's Benefit* (2009), pp. 344-348.
[1221] Hallaq, *Authority* (2001), p. 194 writing particular reference to the Middle Ages.
[1222] Hallaq, *Authority* (2001), p. 194 with further references.

(slander, calumny, defamation), the consumption of alcohol, as well as apostasy (according to most schools).[1223]

To not carry the burden of executing a human without having requested the *fatwā* of a jurisconsult could be employed to legitimize a judge's action towards the community. Such anxieties about judging, particularly regarding crimes that involved death verdicts, were regular features of medieval religious communities.[1224] After all, the death penalty was also an ordering of who should be in or outside the community—and mistakes of a judge in this respect weighed most gravely. *Ḥadd* cases were usually particularly difficult, legally or politically, and the jurisconsults' backing and legitimization was considered important to communicate the outcome of the case. Throughout Islamic legal history, the consciousness for the irreversibility of death penalties made it near obligatory to request a *fatwā* before their execution. One impetus was a moral anxiety inspired by a fear of the very personal spiritual consequences of judging unjustly. At the same time, Muslim judges were conscious not to disregard the moral imperatives entrenched in the *ḥadd* law, namely promoting the values of the protection of life, religion, sanity, honor and property, also known as the five objectives or principles of Islamic law (*maqāṣid al-sharī'a*), as well as the punishment in case of any violation as deterrents. [1225]

Cases that led to the death verdict not seldomly entailed an overlap between juristic and political arenas, like the case of Salīm whose crime of blasphemy questioned Abbasid legitimacy. Also, judge Bishr's judgment of a *ḥadd* penalty regarding the defamation of two righteous caliphs touched upon the question of the highest judicial authority being the caliph's. *Ḥadd* crimes are particularly critical in that they are also related to other fields of law: In Salīm's case, judicial consultation was required as the *ḥadd* crime was tightly linked to questions of testimony, were a diversity of legal opinions existed and were articulated by the jurisconsults. In Bishr's case *ḥadd* was linked to the difficulty of its carrying out, as the authoritative sources leave substantial space for the implantation of punishments. Just adjudication in all cases, and in the cases leading to a death penalty in particular, were recurring themes in both normative and historical-empirical writings

[1223] Peters, *Crime and Punishment* (2006), p. 53-65, including the different takes of the schools of law on including punishment based on Sunna, the classification of ḥadd as (public) claims of God, and the strict rules of evidence for these crimes.
[1224] See Rabb, *Doubt's Benefit* (2009), p. 112, generally on judges' anxiety regarding criminal law, also with reference to medieval judges of Christian faith.
[1225] Rabb, *Doubt's Benefit* (2009), pp. 96, 113.

on judges and adjudication.[1226] The theological burden "to get it right", necessitated joint deliberations of judge and jurisconsults. However, Salīm's case is particularly interesting in that the judge refused to follow the jurisconsults' advice to impose the *ḥadd* penalty: It was probably moral concerns and the insistence on his judicial autonomy, stressed in the normative *adab al-qāḍī* writings in Chapter Two, that resulted in the judge avoiding the death penalty, and rejecting the collective authority of the jurisconsults.

6. With Which Arguments:

The cases demonstrate that on several points judicial practice was in conflict with, or at least differed from, juristic doctrine.

a. School Doctrine

The early formative period was a period in which schools were still nascent, and yet steadily developed and canonized their teachings. The fluid nature of substantive doctrines associated with the earliest schools has given occasion to studies on whether the assembly of divergent views deserves the label "school", or "Ḥanafī school", for instance.[1227]

Still, most judges had an identifiable legal background that allows us to associate them with one or the other legal school, although some of them opted to retain a certain independence, despite their school association. In the examples discussed, the judge's law school affiliation seemed to rather clearly influence his adjudication; however, this was not always the case, even where the judge did not reach out to local jurists from other schools. The case of Ibrahīm ibn al-Jarrāḥ shows that judges in the early formative period had a choice of what school teaching to adopt: Ibrahim ibn al-Jarrāḥ, Ḥanafī *qāḍī* from 205-211/820-826 in Egypt, used to note the variant views of Abu Ḥanīfa, Mālik and others on the back of the case record, deliberate over them for a long time and then mark the one he preferred as an indication to his clerk that the judgment was to be prepared on that basis.[1228] This approach was noteworthy in that it included not only the different legal opinions of Ḥanafī jurists—great jurists Abū Ḥanīfa, Abū Yūsuf, and Ibn Abī Layla

[1226] See Wakīʿ, *Akhbār al-quḍāt*, I, pp. 19-61 (the first chapter preceding biographical reports on judges, beginning with the "[section] mentioning [*ḥadīth* and other] reports announcing the gravity of assuming a judicial post over people and that whoever assumes [such a post] has been slaughtered without a knife: *dhikr mā jāʾa fī ʾl-tashdīd fī-man waliya ʾl-qaḍāʾ bayn al-nās wa-anna man waliyah fa-qad dhubiḥa bi-ghayr sikkīn*").

[1227] On the fluid nature of school doctrines in the first three centuries of Islamic legal history, Chapter One, p. 7-8.

[1228] Kindī, *Kitāb al-Wulāh*, p. 432. See also Coulson, *A History of Islamic Law* (1964), p. 87.

(who also belonged to the supporters of the *ra'y* principle though was not a Ḥanafī)—but also Mālik b. Anas' legal opinion. Taking account of the Mālikī legal opinion made particular sense given that Ibrahīm b. Jarrāh was *qāḍī* in Egypt, where the Mālikī school of law was dominant. We have seen that Ḥanafī judges in Egypt could face some criticism, in some cases leading to their removal pressured by the local jurisconsults, if they did not consider Mālikī law in their adjudication. *Qāḍī* Ibrahim b. Jarrāḥ seems to have taken the Mālikī opinion quite seriously when deliberating his cases, albeit without necessarily adopting it as binding. Despite this broad-minded approach, Ibrahīm b. al-Jarrāḥ did face some opposition, which became evident when in a gathering of local legal scholars, opposition against his adjudication was articulated and the Mālikī ʿIsa b. al-Munkadir became new judge of Egypt[1229]: *Qāḍī* Ibrahīm was, despite some openness towards the Mālikī legal tradition considered a foreign, i.e. Ḥanafī judge, who seemingly had not often enough applied Mālikī law (as his son's advice to employ a Mālikī examiner of witnesses implies) and who was perceived as (too) close to the Abbasid court (*abnā' al-dawla*).

The Iraqi city of Basra also offers several examples of how school divergence was a crucial reason for the friction between the judge and the legal and social communities. Thus, the appointment of the Ḥanafī *qāḍī* Makhzūmi to Basra around 173-174/789-790, which had its own legal tradition, resulted in the jurisconsult's opposition to his adjudication, and in due course to the judge's removal from office only four months.[1230] Very few *qāḍīs* of the Ḥanafī school were appointed until 198/813-814, and their tenures lasted for an extraordinarily short period of time, compared to those judges from the Basran local legal tradition: autochthonous judges adhering to the Basran legal thought remained in office on average for six years, while judges who were close to the Ḥanafī legal thought on average made it merely for roughly one and a half years.[1231] The weight of the local jurisconsults was therefore decisive in the choice and success of *qāḍīs* during that time. Only the changing doctrine in the legal community of Basra eventually allowed for Ḥanafī judges to last in adjudication. It was the local jurists and their preference for a particular school of law and not the central appointing power, the caliph

[1229] See the consultations that lead to the removal of judge Ibrahīm, Chapter Three, I.2.b.dd (and instead led to appointing judge ʿIsā b. al-Munkadir.
[1230] Wakīʿ, *Akhbār al-quḍāt*, II, p. 142. On judge Makhzūmi turning to the jurisconsults, see Chapter Three, 1.3.a.
[1231] See the time table for the judges of Basra, Tilier, *Les Cadis* (2009), Annex B, pp. 699-704.

and his Ḥanafī chief justice (*qāḍī al-quḍāt*) Abū Yūsuf, who had the authority to decide on the judiciary of Basra.[1232]

The weight of the local jurisconsults is even more significant given that the central Abbasid government increasingly shifted towards a Ḥanafī school.[1233] This preference resulted in the widespread appointment of judges trained in that school to offices in the provinces. Yet, the Abbasid support alone was not sufficient for a judge to exert his authority in his local jurisdiction as the case of Ismaʿīl ibn al- Yasaʿ shows, who was on record as the first *qāḍī* to apply Ḥanafī law in Egypt. Although his ability as a judge commanded general respect, his application of unfamiliar and alien rules—particularly his policy of the annulment of charitable endowments, as advocated by Abu Ḥanīfa—provoked sufficient resentment to cause his dismissal 166/783.[1234] Similarly, the Ḥanafī judicial candidate al-Anṣārī in Basra was rejected by (parts of) the local jurisconsults because of his law school affiliation and the concrete (economic) legal changes this would entail.

The school dynamic thus is obvious: when the affiliation of the judge and the local jurists was corresponding, conflict over legal cases was not documented. When school affiliation was not corresponding, conflict was possible and led to the local jurisconsults articulating their concerns, be it regarding the appointment or removal of a judge or, at least, regarding their opposition to his adjudication concerning particular cases. The Ḥanafī school reacted to the frictions between Ḥanafī judge and local majority-non-Ḥanafī jurisconsults by including some of the local traditions, and thus gained more access to the judiciary and possibly less friction with the jurisconsults. In the case of Basra, for instance, only when the dominant Basran legal tradition gradually developed towards Ḥanafī legal thought, it became easier for the jurisconsults and the people of Basra to accept Ḥanafī judges. It is likely that the same is true for the Iraqi cities of Kufa and Wasit, despite incomplete data that allowed fewer accuracy and a row of exceptions.[1235]

[1232] Tsafrir, *The History* (2004), p. 36; Tillier, *Les Cadis* (2009), p. 180.
[1233] On the reasons for the gradual preference of Hanafī judges, see Chapter Four, III.1.e.
[1234] Coulson, *A History of Islamic Law* (1964), p. 87.
[1235] When the Ḥanafīs started to include more local traditions into their legal thought, they gained more influence in the judiciary, see for the Iraqi cities of Kufa and Wasit, see Tsafrir, *The History* (2004), p. 218; on Kufan legal tradition and its effect on the judiciary, Tillier, *Les Cadis* (2009), pp. 181-182. On the "traditionalisation" of the legal method, see Melchert, "Traditionist-Jurisprudents" (2001), p. 401; Melchert, "How Ḥanafism came to originate in Kufa" (1999), p. 341. On Wasit, see Tillier, *Les Cadis* (2009), p. 182-183. On Māliki judges in Wasit, see Tillier, *Les Cadis* (2009), p. 183-184.

b. Changing Socio-Economic Patterns

Arguments about school of law doctrines were almost always arguments about maintaining or changing socio-economic patterns. In fact, judicial activism (in private law) refers to willingness to change or evolve the law in ways that upset existing patterns of economic and social advantage.[1236] This is why the judicial activism of judges adhering to law schools other than the local one made jurisconsults particularly nervous, out of fear that both economic and social patterns would be – even within claims of textual fidelity – changed.

A foreign *qāḍī* adhering to a foreign law school, meaning a law school that had no or little following in the jurisdiction, either upset the local economic structure or the local social structure. The economic pattern was disrupted through differing rulings on property law, especially on endowments and the inheritance rights deriving from them. It was feared that these changes (usually Ḥanafī law when applied in Mālikī Egypt) could affect the material wealth of the rich in the city. Testimony law endangered the social order of who would be credible witnesses and who would not be – referring to nobility or respectable local families.

Thus, any legal novelties could only be introduced to society at large when the religio-legal establishment agreed to them and thereby legitimized them.[1237] Legitimization occurred through the *qāḍī* requesting consultation, or, if consultation was unsolicited and instead imposed by the jurisconsults, through the *qāḍī* following it. In legitimazing the *qāḍī's* law, jurisconsults played a pivotal role in creating and extending, and adapting the Islamic judicial system to new socio-economic realities.

It thus comes to no surprise that jurisconsults often voiced their criticism both as legal experts as well as local elites interested in maintaining the socio-economic status quo.

Critique was almost always brought forward by local legal scholars, when they appeared as a delegation before the caliph or governor. Probably the participants of the delegation came *qua* legal scholars, but this did not exclude them also coming as representatives of their city.[1238] The part of the population who would articulate their complaints, probably the nobility and the political and economic elites, who would be most affected by

[1236] Kennedy, "Toward an Historical Understanding of Legal Consciousness" (1980), p. 5.
[1237] Motzki, "Religiöse Ratgebung" (1994), p. 14.
[1238] Discussion of popular complaints in the case of judge Yaḥya b. Aktham (for seducing men), Chapter Three, I.2.a.ee.

adjudication would probably also have a word in transporting the complaints to give them even more weight. In some cases, there was an overlap between local scholars and local nobility, in others legal scholars were accompanied or sometimes led by some notability of the city. This combination might have been indeed been a strong one: Joining elite authorities, the legal-moral with the political-financial authorities, would in most cases have been an effective way to either threaten the caliph with local uprisings or reassuring him of local stability supported by the local elites.

c. Legal Culture and Custom

Creating legal authority is not alone related to making visible a fidelity to authoritative texts. Rather legal authority exists "to the extent that the stories judges tell resonate both in the world from which the disputes and conflicts come and in the specialized world of legal discourse."[1239]

The fact that there was a consciousness of legal culture and custom affecting adjudication and that adjudication needs to resonate with the culture of the population adjudicated can be demonstrated by the following example:

Caliph Abū Jaʿfar ordered Ghawth (d. 168) [from Egypt] to adjudicate amongst the people of Kūfa [Irāq].

- Ghawth told me: Oh Commander of the Faithful, this city [Kufa], is not my city. And I have no knowledge of its people and its customs. And when I invite people to come with their litigations and no one comes to seek legal recourse, do you then allow me to return to my region [Egypt]?

- The caliph said yes.

- So Ghawth sat to adjudicate, and invited the litigants [to present their cases] but no one came. [1240]

Judge Ghawth from Egypt anticipated that his adjudication would not be in demand, given the different legal cultures of Egypt and Kufa. The character of law, and the character of Islamic law is that it is locally bound legal tradition, bound by local culture ad custom.[1241] Judge Ghawth was aware of the wider societal conditions, and he knew that a judge was

[1239] Legal Scholar Scheppele remarks: "[L]egal authority is not simply internal to legal culture, but … pertains to the relationship between legal culture and the culture of the world into which it is an intervention. Legal decisions have authority to the extent that the stories judges tell resonate *both* in the world from which the disputes and conflicts come *and* in the specialized world of legal discourse." Scheppele, "Facing Facts in Legal Interpretation" (1990), p. 60.

[1240] Kindī, *Kitāb al-Wulāh*, p. 379. In another account Ghawth does not invite the litigants to come and solve their judicial affairs, and the account does not indicate Kufa, and the caliph requires the judge to stay there.

[1241] Van Ess, *Theologie und Gesellschaft* (1992), II, p. 121.

expected to provide adjudication that is, at least in part, satisfactory for those living under it. Legal culture thus has a powerful effect on the authority of legal personae.

But legal personae, the legal elites, also shape legal cultures.[1242] Jurisconsults were aware that the judiciary as a law-making elite could well shape legal culture. In the case of judge Ghawth, the population itself refused to grant authority to the judge. Were the population did not or could not do so, it was the local jurisconsults that were determined enough to reject the authority of the judge as his judicial law-making was "not familiar" to them, as articulated by the Egyptian jurisconsult Layth b. Saʿd when he called for the removal of Ḥanafī judge Ismaʿīl b. al-Yasaʾ.

d. Preserving or Harming the Sunna and the Authoritative Texts

In their role as controllers of adjudication, jurisconsults implicitly and explicitly wanted to preserve the living tradition of the Prophet, the Sunna. To do so, it seemed to have been at times important to curtail judicial discretion in deference to (divine) legislative supremacy presented in the text. It is of course a legal construct to speak of such deference given text's indeterminacy; the legal process always involves a measure of interpretation, whether involving "the law" as embodied in texts or the facts to which those laws are supposed to apply.[1243]

However, Mālikī jurisconsult Layth b. Saʿd explicitly accused Ḥanafī *qāḍī* in Egypt, Ismāʿīl b. Yasāʿ, of harming the Sunna of the Prophet with his judgments on property law.[1244] He hereby made an argument that made it difficult for the caliph not to remove the judge from office.

When the jurisconsults in the instance of appeal needed to re-examine judge Bishr's judgment resulting in a death penalty[1245], they too, argued that legal discretion had been misapplied. This is an implicit way of saying that the authoritative sources had been violated by the judge. Instead, their legal opinion was now to set straight the mistake of the judge by exerting legal discretion in a way that preserves the authoritative sources.

While these cases portray the jurisconsults as guardians over the authoritative sources, much as Shāfiʿī would want to see them and the benefitial aim of consultation[1246], it nevertheless is

[1242] Watson, "Evolution of Law: Continued" (1987), p. 569.
[1243] Rabb, *Doubt's Benefit* (2009), pp. 7-8.
[1244] Kindī, *Kitāb al-Wulāh*, p. 372.
[1245] Wakīʿ, *Akhbār al-quḍāt*, III, p. 273.
[1246] See Shāfiʿī on judicial consultation, Chapter Two, V.2.b.bb. (2.)

striking that religious arguments are seldomly made explicit. More often, it seems, are arguments of legal hegemony, be it through preserving the own law school's dominance or the socio-economic order that motivates the jurisconsult's opposition to judicial practice. This goes to prove that, obviously, in a religious legal order, rather than religion *per se*, jurisprudence, power and authority can mark the course of the law.

III. Conclusion: Regulating, Controlling, Ordering

Jurisconsults seem to have exerted their authority vis-à-vis the judge to regulate, control and order the law, and its judicial system. The consciousness for the indeterminacy of the law and the wish to protect the authoritative sources against subjective elements in adjudicative law-making as elaborated in the normative writings of the jurists of the time (Chapter Two), seem of less articulated importance, if judged by the documented cases of judges and jurisconsults encountering each other in practice. Jurisconsults exerted their authority much earlier and in more fields of influence than discussed by the authors of the *adab al-qāḍi* (Etiquette of the Judge) works in Chapter Two.

Jurisconsults regulated adjudicative law in many ways: in exchanging correspondence with judges, like *qāḍī* of Egypt Mufaḍḍal with Medinan jurisconsult Mālik b. Anas. Both legal figures engaged in joint legal discourses over detailed legal questions like those regarding the laws of blasphemy and endowment as they were not determined by the authoritative sources and not yet fixed through a consenus of fellow jurists of the same school.[1247] In the instances of appeal, jurisconsults also exercised horizontal and vertical peer review where they affected the course of law, and the careers of the judges. Their legal review lead judges to "voluntarily" resign or to be removed from office shortly later, as the cases of judge Harīth b. Miskīn in Egypt over the endowment case "house of elephant" and Ḥanafī judge Makhzūmī in Basra over a case that he preferred to postpone judgment and deferral to the council of jurisconsults.

Jurisconsults also regulated the law in attempting to unify and standardize the law. Especially in the field of procedure, were judges had wide discretion, the laws of testimony were sought to be harmonized with school doctrines on testimony. Jurisconsults were thus crucial in unifying, and Islamicizing, the law in the formative period.[1248] This was an important

[1247] See in this Chapter Three, I.3.c.and d.
[1248] On the importance of legal scholars for the unification of the law, see Chapter Four, II.

alternative to having codified law. They thus also affected the institutionalization of Islamic law at court.

The cases of death penalty are the most striking onces in which jurisconsults shared the judge's burden and moral anxiety over the execution of a human being. Both legal personae engaged in juridical risk distribution, and jurisconsult Qutbah explicitly and personally underlined his joint responsibility with the judge over this adjudicative burden.
Jurisconsults themselves ordered the law, but they also obstructed judges from ordering the law when it did not suit their interests. So, for example, judicial activism seems a crucial theme for both normative and empirical interventions of jurisconsults. Critically, though, judicial activism had different meanings. While normatively, in Shāfiʿī's writings in particular, judicial activism was meant as violating or substituting authoritative texts with subjective reasoning, empirically, the judicial activism that gathered opposition amongst jurisconsults was the one that risked changing the social and economic order through judicial decisions "unfamiliar" (Layth b. Saʿd) or unwanted of. What normatively, "in the books" (Chapter Two) came across as particular care for divine text, wishing to maintain the character of *ius divinum*, "in action" (Chapter Three) refers more to the interests of an elite class.

With their consultation and *fatwā* practice, jurisconsults to a certain extent also controlled adjudication.[1249] Their control affected the judge's adjudication both on a horizontal as well as vertical level. Horizontally, judges were challenged by jurisconsults at all stages of litigation and either voluntarily solicited legal opinions or were met with criticism concerning the changes they introduced via judicial law-making. At times, judges and jurisconsults sorted out their different conceptions of the law independent of any other force: the (anticipated or received) critique of the jurisconsult controlled and influenced the course of adjudication, and judges would often follow the (local) legal jurisconsult's interpretation. At other times, namely when the jurisconsults' persuasive strength did not bring about the wanted results, jurisconsults resorted to the caliphs to remove the judge, employing their quasi-coercive authority over the judge. Vertically, councils of jurisconsults were iniated by litigants and convened by the political authorities. It gave the political authorities, not seldomly the caliph himself, a means to control the judges via the jurisconsults who revised the entire case. Despite the quasi-independence of the judges and their formal non-

[1249] See also Motzki, "Religiöse Ratgebung" (1994), p. 14.

accountability to no one but occasionally the caliph, the jurisconsults had an eminent role of controlling, and more so, shaping adjudication: Jurisconsult(s), singular or plural, sat as real or anticipated *muftīs* on the bench, and proved that they were part and parcel of Islamic adjudication. We have learned that the *muftī* is much more directly involved in adjudication than often assumed[1250], has different ways of effecting not only who becomes judge or is removed as judge, but also tries actively to influence the judge's law making.

Jurisconsults are regulating, controlling, ordering the law, in cooperation and in confrontation with the judge. Cooperation in the sense of consultation being solicited (and welcomed) by the judge, confrontation in the sense of consultation or legal advice being issued without or even against the wish of the judge. Chapter Four explains that the way the scholarly expertocracy was organized even allowed for a status of cooptation into the adjudicative system, in that cooptation attempts to incorporate the jurisconsult into the bureaucratic hierarchy and provides him with authority over colleagues.[1251]

Soliciting consultation help win over those who are asked for advice, win them for the judge's cause. The advisor is being asked and listened to, i.e. their advice is being appreciated and thereby their standing is augmented. In reverse, the judge shields himself from the protest and anger of the jurisconsults in case they disagree with his decision. This mobilizing and harmonizing function leads to an integration of legal personae which allows them to eventually jointly disseminate and intensify Islamic law, in a period where the Islamization of the law was still underway. It led to a strengthening of the role of the advice-seeking judge, and, sometimes, to a joint group identity of judge and jurisconsult as legal elite. Advice seeking could also be a way of calling for, demanding loyalty and reliability – this is even more important, the more delicate and crucial a matter is, making a consultation even a necessity for a successful decision and for the post-decision phase. Judicial advice-seeking thus was also a form of legal, (extra-) judicial validation of the judgment – enlarging the legitimacy of judgments, precisely when they are legally, or possibly politically, controversial. This way the judge and his decision were backed by the jurisconsult vis-à-vis the community. This, in return, was a necessary means to gain community support, and to provide peace through justice, which was necessary to remain in office.

[1250] VikØr for instance assumes that *qāḍī's* court belongs to the state, but that the *muftī* stays (in principle) away from the courtroom and is only in indirect contact with it through the presence of his written opinions. VikØr, *Between God and the Sultan* (2005), p. 187

[1251] On cooptation of the jurisconsult into the adjudicative system, see Chapter Four, III.1.c.

Possibly, to not seek advice could come close to an affront and could be read as sign of rudeness and arrogance, especially where there is already an established convention of consultation, as was the case in the pre-Islamic Arab peninsula. For a judge not to seek advice risked the danger of raising opposition by the jurisconsults, and eventually having them call for his removal.

On the other hand, an influential scholar acting as a jurisconsult could lend some of his authority to a judge—or, when necessary, deprive him of it.

The fact that judicial consultation was not institutionalized actually served the function of integration.[1252] It allowed a flexibility over who to ask, since principally *anyone* qualified to exert *ijtihād* could be solicited. Also, being able to request advice *any time*, rather than drawing back to an *always* present advisory committee, proved useful in the sense of preventing the threat of immanent dissent.[1253] It was the authority of the judge that determined when he decided to solicit counsel. A choice of jurisconsults considered relevant or considered to deserve priority over others could have proven fatal to the Islamic judicial system in a still growing and expanding Empire. Like this, anyone the judge considered to be a qualified, pious jurisconsult of integrity could be incorporated to the judicial decision-making process. This gave the judge an added flexibility on the choice of the jurisconsults' law school adherence. In fact, the jurisconsult solicited was not always of the same school of legal thought as the judge. An institionalization thus was not established - a rather successful course of history.

In some cases, jurisconsults and judges engaged in a struggle to gain and sustain acceptance for their conception of the law's social whole and the law's internal organization.[1254] Two examples studied underline this idea: One, procedural law and the conflicts that erupted between legal authorities over who should be admitted as a just witness, or what the details of the law of evidence ought to be link these legal problems to what a just and trustworthy society ought to be. When jurisconsults and judges argue about these questions than almost always questions of law as religion, morality and the society as a whole are reflected. Also, questions that arose from when to apply capital punishment are questions on the limits of a society, with legal authorities wishing to mark an example.

[1252] Similary, Badry, *Die zeitgenössische Diskussion um den islamischen Beratungsgedanken* (1998) p. 72 with respect to the accommodating circle of consultants the Prophet had, instead of a rigid group of people.
[1253] Badry, *Die zeitgenössiche Diskussion um den islamischen Beratungsgedanken* (1998), p. 71.
[1254] See Terdiman in the introduction to Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987), p. 4 on the conceptions that legal professionals have of their own work.

Chapter Four. Authority through Organization

After having studied normative and empirical aspects of authority between judge and jurisconsult, this chapter shall highlight the macro-level of how and to what extent organization creates authority.[1255] How did organization enhance or limit the authority of legal personae vis-à-vis each other? How did organizational reforms such as the judge's direct appointment by the caliph and the rise of the scholars and the growing consolidation of the schools of law affect their authority in a situation of such significant transformations?

The aim of this chapter is to explore how the legal personae's authority is linked to the way they were organized. For instance, both judges and legal scholars underwent diverse degrees of professionalization as organizational process. Their respective professions emerged as occupations that each conferred on them not only social esteem, but also privileges and prestige, and thereby authority. Their knowledge and skills were commonly held to entitle them to exercise authority over others, even over social or political superiors.[1256] Professional prestige, in turn, rests upon the mastery of knowledge and skills unknown and unavailable to non-professionals.[1257] But what does professional prestige rest upon towards professionals that master the same knowledge, and are qualified to exercise adjudication once appointed?

As introduced in Chapter One, legal authority can be ascribed to individuals (judge, jurisconsult), groups of people (the collectivity of jurisconsults), or institutions (court, i.e. the judge and his staff, or the circles of learning), or to an order, such as the one law itself attempts to create.[1258] Authority can be ascribed to a person (personal or primary authority ascribed or claimed based on personal bound criteria, special knowledge or experience, as illustrated for judge and jurisconsult in Chapter Two) or the position s/he holds, which is the focus in this Chapter Four. When authority is linked to a position (such as office or rank), institution or organization, authority is qualified as positional, or

[1255] Weber argues that organization creates rule, Weber, *Wirtschaft und Gesellschaft* (1980), pp. 548-550. On the scholarly field of judiciary practice with its personnel and organisational structure (*Justizsoziologie*), see Rehbinder, *Rechtssoziologie* (2000) pp. 161-163.

[1256] See Brundage "The Rise of Professional Canonists" (1995), p. 27. Further on how continental European law and later US-American law emerged as a struggle between diverse authorities of the law, for instance, Berman, *Law and Revolution* (1983).

[1257] Ibid.

[1258] On the diverse aspects of authority, see Chapter One, I.2.

abstract, formal or secondary authority. Both types of personal and positional authority can appear combined with each other.[1259] In this chapter the concept of authority shall be extended from examining the level of the individuals to the level of organizations and institutions. Organizational or institutional authority in this sense refers to an authority that emerges from some body that is larger that just one individual. The institution needs not to be a formal one, but it must be the result of collective effort.[1260]

This chapter is to elucidate the organizational conditions for holding effective authority, explaining under what conditions legal actors obtained or held authority, under what structural circumstances legal personae were likely to agree or refuse to accept the authority of some other legal personae. How do types of organization, such as judicial bureaucracy or scholarly collegiality, constitute or enhance authority? How did a proximity or distance of the judiciary and the scholarly field to the state shape their respective organization and thereby legal authority? And what happens when different ways of organizational authority encounter and even conflict?

The chapter takes account of the role of the state as an organizational factor in contributing to legal personae's authority.[1261] What role did the state play, or not play? And in how far did the state leave it to legal personae to regulate their relation to each other?

These questions prove significant for the maintance of the ruling authority: Early pre-modern as well as modern states had a limited core of classic concerns: Next to securing borders and war making and the extraction of fiscal resources (taxes), the administration of justice were central preoccupations.[1262] With increasing organizational rationalization, states sought to impose regulations on legal practice. These regulations were often applicable only to those legal personae who had to appear in court, both because the courts were deemed especially sensitive and important for stability through justice and because legal activities outside the immediate institutions of the state, such as the

[1259] Gukenbiehl, "Autorität" (2001), p. 29.
[1260] Tomeh, "Persuasion and Authority" (2010), p. 145.
[1261] Critically on the development of the term "state" in Europe's ius publicum, Dilcher/ Quaglioni, *Auf dem Wege zur Etablierung des öffentlichen Rechts zwischen Mittelalter und Moderne*, 2011. Distinguishing state from rule and administration of the early modern European state, Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, I, (1988), pp.46-48.
[1262] Similarly for the Abbasid state, recall Al-ʿAnbarī's letter to caliph al-Mahdī in 159/775-776 in which he laid out guidelines for the administration of the Empire regarding four administrative matters: 1) the defence of the frontiers of the state, 2) the systematic appointment of judges and the laws administered by them; 3) the even-handed levying of land tax, as well as 4) proportional taxation on trade, Wakīʿ, *Akhbār al-quḍāt*, II, p. 100-105. For a normative discussion of the letter, see Chapter Two, II. 3. For the early modern state and its control on the legal profession, see Rueschemeyer, "Comparing Legal Professions" (1986), p. 438 were he adds internal policing as a major fourth concern of the early modern state.

scholarly field, were difficult to bring under such close control. [1263] This shall also explain a judge-centered perspective taken in this chapter, given that regulations on the judiciary were easier to impose, while the legal scholarly field retained much of its freedoms. Because of the jurists' role as guardians of Islamic law as *ius divinum,* ruling authorities had nevertheless an interest in establishing and maintaining beneficial relations with them that bolster the legitimacy and authority of their rule.

The chapter is arranged along the scale of centralization and decentralization, as possible ways of administering law and legal authorities. The chapter therefore goes from a centralized judiciary to a non-centralized, i.e. non-codified law to a decentralized domain of jurisconsults. Thus, the chapter first re-constructs how the judge's authority was constructed (and criticized) by Abbasid reforms to centralize, professionalize and bureaucratize the judiciary. Second, the chapter looks at the state of the law, and how failed attempts to codify the law served to enhance the authority of the centralized judge and the decentralized scholar of law.
Third, expertocracy and professionalization of the scholars in their decentralized and little institutionalized form shall elucidate scholarly authority and be compared with the judge's organizational authority.

I. Authority through Centralization, Professionalization, and Bureaucratization of the Judiciary

The authority of the judiciary was majorly enlarged by the Abbasid impetus to centralize, professionalize and bureaucratize its state officials, as this Part I of the chapter lays out.[1264] Centralization was accomplished by appointing, controlling, paying and removing the judiciary by the caliph, as well as introducing the position of chief justice (*qāḍī al-quḍāt*) to centrally assist in supervising the judiciary. Professionalization, as a second major theme of this Part I, became increasingly apparent through a specialization of legal and judicial tasks, educational training in the nascent schools of law, establishing qualifications, ascertaining a monopoly of occupation, developing a professional code of conduct, and advancing the judiciary as a full-time occupation with the appropriate

[1263] Rueschemeyer, "Comparing Legal Professions" (1986), p. 438.
[1264] For an insightful parallel discussion of the increasing centralization of judicial policy in 19th century Germany and its effect on the professionalization of the judiciary as means of political control, see Ogorek, *Richterkönig oder Subsumtionsautomat?* (1986), pp. 18-19 and particularly pp. 26-29.

salary. These elements of professionalization appeared both in autonomy from public authorities as well as with major support of the state. As a third pillar of the organizational authority, I demonstrated how the judiciary benefited from a bureaucratization, comprising the aspects of fixed and official jurisdictional areas, adjudication as an official duty, office hierarchy and judicial personnel, written documentation and the official activity as a bureaucratic activity.

1. The Caliphate Centralizing the Judiciary (Context and Setting)

Political and social factors shaping authority cannot be understood without the centralized political authority of the Abbasid caliphs as well as increasing urbanization of a pluralistic society in the vast Abbasid territory, spanning from parts of Northern Africa to India[1265], and the gradual transformation of Islam into a majority religion and into a political and social reference point in the Abbasid Empire.[1266]

As laid out in Chapter One, the Abbasid caliphate's self-image is fundamental for the major innovations and reforms affecting legal personae, be they in the judiciary or the scholarly field: After their successful revolution taking over power from the Umayyads, the Abbasids needed to live up to their promise that, unlike their predecessors, they are an Empire that serves justice. The Abbasid revolution had drawn mass support from the idea that rule by the house of the Prophet would bring true Islam and the end of injustice and oppression. Thus legitimacy and authority of the Abbasids was closely connected to a just and respected judiciary to which they have paid much attention.

At this time, the Abbasid caliphate (*dawla*)[1267] was in its phase of consolidation and needed to create and maintain a unity and a preferably common, or at least operational, understanding of the law. They had their vision of a "rule of law".The caliphate thus fostered an intimate relationship with the law and its legal personnel. The ruling authorities could not dispense with the jurists, for it had become clear that legal authority, inasmuch as it was epistemically grounded, was vested with those that had

[1265] The early Abbasid caliphs ruled a vast empire, covering an area ranging from Ifriqiya (modernTunisia and eastern parts of Algeria) in the West to the Indian subcontinent in the East, including Central Asia and the Caucasus, Persia, Mesopotamia, the Fertile Crescent of Syria and Palestine, Egypt, and Yemen in the South.

[1266] On strengthening the judiciary in a vast territory (like the USA) as a structural governance reason and as an element of social integration in a pluralistic society, and on the courts as a first-order agencies of implementation of centralization see Parsons, "Professions" (1968), p. 544.

[1267] *Dawla* first meant turning (or turning point), representing the revolution, then dynasty. It eventually came to mean state, see Rosenthal, "Dawla", *EI2*, II, p. 177-178. Tillier, "Abbasid Dynasty", *The Oxford International Encyclopedia of Legal History* (2009), I, p. 1-2

studied the texts and gained scriptural authority, whether they held authority as judges or legal scholars.
It is precisely because of this epistemic quality that the ruling authorities needed the jurists to fulfill the empire's legal needs, despite its understanding that the jurists' loyalties were not to the government but to the laws. [1268]

For the Abbasid state, legal advice and advisers were important in many questions caliphs decided. There are many examples of caliphs being surrounded by legal personae, jurists, judges, and their respective chief judges, discussing both legal and religious questions.
Caliph al-Rashīd, for instance, had a circle composed of chief justice Abu Yūsuf, jurists (*fuqahā'*) and acting judge Sharīk around him, discussing the way to determine the end of the month of Ramadan.[1269] Caliph Al-Muhtadī also had his council of jurists advising him in many questions.[1270] To this end, early Abbasid policy also encouraged the spread of Islam. Justice, after all, is a core element of religion – and the Abbasids had a strong interest in establishing themselves as a religious authority as well, to underline their legitimate claim to power. [1271] Abbasid attentive policy towards the judicial system thus originated out of their aspiration for the recognition of religious and legal legitimacy of their power. Abbasids thus pursued a policy of winning over jurists for their caliphal project, judges and legal scholars, with salaries for the first and stipends within a system of patronage for the latter. Groups of scholars, primarily occupied with the law, emerged and met the goodwill of the caliph while they stayed by and large independent of central caliphal policies. [1272]

When the Abbasids forcefully gained caliphal reign from the Damascene Umayyads in 132/750, they gradually but decisively embraced legal authorities into their state, be it the judiciary or legal scholars. The strengthening of the judiciary and the simultaneous

[1268] Hallaq, "Juristic Authority vs. State Power" (2003-2004), p. 251.
[1269] Wakīʿ, *Akhbār al-quḍāt*, III, p. 174.
[1270] Wakīʿ, *Akhbār al-quḍāt*, II, p. 280.
[1271] Their claim for religious authority is also reflected in the use of the official title *imām* for the caliph, first introduced by caliph Ma'mūn, Kennedy, *The Early Abbasid Caliphs* (1981), p. 136-137. See also the title caliph itself, (*khalīfa,* lit. successor) interpreted as the successors of the Prophet in worldly affairs and the title "shadow of God on earth" (*ẓill Allāh fī arḍi hi)* that were used by and for the rulers. For the honorific titles adopted by the Abbasids to counteract the claims of the Shiʿites to the caliphate, see Bosworth, "The Heritage of Rulership" (1973), vol. 11, pp. 51-54 with further references; see also Shaban, *ʿAbbasid Revolution* (1970), pp. 166-167. For example, the honorific titles caliph al-Manṣūr adopted for him ("al-Manṣūr" i.e. he who is granted victory) and for his son al-Mahdī, "the Messiah".
[1272] Gutas, *Greek Thought, Arabic Culture* (1998), p. 76.

public rise of legal scholars and their nascent schools of law as two concurrent developments shall set the stage for an exemplary understanding of authority of Islamic legal personae vis-à-vis each other.

Abbasid legal and judicial policies were marked by three characteristics, illustrating a centralizing state impact on the law: An increasing centralization by advancing steps towards a state-driven judicial professionalization and bureaucratization, (non-realized) ideas to codify the law, and caliphal patronage of an emerging, decentralized collegial body of legal scholars.

These features taken together shall allow for a conceptualization of the organizational authority of judges and jurisconsults. It is this balancing of authority in the public realm between a centralized, professionalized and bureaucratized judiciary on the one hand, and the decentralized scholars, esteemed for their knowledge, on the other hand, that sets the frame for posing questions on authority. The centralized judiciary and the decentralized legal scholars are both affected by the law in its non-codified but increasingly canonized state.

Before delving entirely into the field of judicial administration, it should be said that centralization as a principle of reorganization did not only affect the judiciary but also further major domains of the Abbasid Empire, and was thus considered to be a main innovation and feature of the Empire, distinguishing it from its predecessors, the Umayyads.[1273]

The most visible symbol of their centralizing world view, was the architecture of the newly established Abbasid capital Baghdad, capturing the overarching "architecture of centralization". [1274] Baghdad was built in 762 on the West Bank side of the Tigris river under caliph al-Manṣūr, the second Abbasid caliph. [1275] Indicative of a distinctive

[1273] Simultaneously, centralization efforts faced tensions in some, particularly strong provinces. Therefore, some measures of decentralization were necessary and were provided without destroying the unity of the empire. This was the case, for example, with the province of Khurasān, granting a degree of local government while keeping them within the control of the ruling dynasty. Kennedy, *The Early Abbasid Caliphate* (1981), p. 125.

[1274] Gutas, *Greek Thought, Arabic Culture* (1998), p. 52.

[1275] Several reasons were mentioned for seeking to found a new capital: One, the need for security, thus the construction of a fortress-palace which could easily be defended. Secondly, the desire felt by many dynasties to have a new capital to demonstrate their identity and prestige. Third, The Abbasids had chosen Iraq as the center of their power as they were counting on the support of the population which has largely participated in overcoming the Umayyad Empire. Also, Iraq provided the larget share of the revenues of the caliphate. Kennedy, *The Early Abbasid Caliphate* (1981), p. 86-87. The most important sources on the foundation of Baghdad are Tabari, *Ta'rikh*, III, pp. 271-82; 319-26; Yaʿqūbī, *Buldān*, pp. 238-54; Khatib al-Baghdadi, *Ta'rikh Baghdad*, published in English translation by Lassner, *The Topography of Baghdad*

centralizing ideology is the shape of new capital, Baghdad. The round shape of the city, or the Round City[1276] with the caliphal palace, main mosque and administrative headquarters situated in the centre, is symbolical of centralized rule and control.[1277]
Centralization was not exclusive to the judiciary but was introduced by the Abbasid caliphs in all fields of the government. Centralization was principal in the financial[1278] and administrative realm[1279] of the Empire. On the fiscal level, caliph al-Ma'mūn instituted a far-reaching coinage reform that produced uniformity in, and granted Abbasid control over, provincial mint outputs.[1280] On the military level, he adopted policies that centralized the army. On an ideological level, he adopted the title "God's Caliph" in 201/ 816-17[1281], underlining also that he claimed that his legal and judicial system was in line with the Sharīʿa as divine law. It is thus no accidental phenomenon but rather characteristic of the overall Abbasid system. One significant way of centralizing the Empire was by increasing the supervision on the application and execution of the law through the centralization of the judiciary.

1. Centralization of the Judiciary

Centralization means control of some process from "the centre".[1282] This centre is the Abbasid caliph, the highest judicial authority to act on behalf of and within the confines of the Sharīʿa. He exerted his judicial power in gradually expanding his control over the judicial administration. This was realized with the aid of his state apparatus comprising chief justices and postal officers to transmit information to the caliph. The caliph was actively involved in the formation of the judiciary. He chose and appointed judges, and

in the Early Middle Ages (1970), pp. 45-110. For further accounts see Duri, "Baghdad", *EI2*, p. 899, Creswell, *Early Muslim Architecture* (1940), II, pp. 4-38; Le Strange, *Baghdad under the Abbasid Caliphate* (1900); Jawad/Sousa, *Kharitah Baghdad* (1958).

[1276] Kennedy, *The Early Abbasid Caliphate* (1981), p. 88. Creswell, *Early Muslim Architecture* (1940), II, pp. 4-38; Le Strange, *Baghdad under the Abbasid Caliphate*, Oxford 1900; Jawad/ Sousa, *Kharītat Baghdad* (1958).

[1277] Caliph al-Manṣūr is said to have selected this form because, when situated in the centre of the circle, he would be equidistant from all sections of the city. For Gutas this appears to be an application to city planning of Euclid's definition of the circle, *Greek Thought, Arabic Culture* (1998), p. 52.

[1278] Exemplary for financial centralization is the work of jurist and chief judge Abū Yūsuf *Al-Kharāj* on the Abbasid tax system submitted at the request of caliph Hārūn al- Rashīd. See Kennedy, *The Prophet and the Age of the Caliphates* (2004), p. 132.

[1279] Heck, "The Role of Law in Abbasid Thought" (2004), pp. 83-109.

[1280] El-Hibri, "Coinage Reform under the ʿAbbāsid Caliph al- Maʿmūn" (1993), pp. 72-7. Gutas, *Greek Thought, Arab Culture* (1998), p. 80.

[1281] Gutas, *Greek Thought, Arab Culture* (1998), p. 80.

[1282] See Donner "Centralized Authority and Military Autonomy in the Early Islamic Conquests" (2008), p. 264.

paid them a regular salary from the imperial treasury. He monitored their activities and removed them from office when they did not serve the purpose of serving justice and thereby delivering stability.

Components of centralization encompass (1) the existence of some central concepts motivating the ruler, (2) the existence of a ruling elite dedicated to the principles of these central concepts, and (3) the capacity of the ruling elite to realize the plan of centralization through direct and indirect rules and policies.[1283] A major concept motivating the caliph to introduce judicial centralization was it to standardize the organization of the judiciary throughout the Empire. This was pivotal for the establishment of a stable judicial policy which was meant to play a key part in securing Abbasid rule and legitimacy. Given that the caliphs left the development of the law largely to the jurists, the caliph could not affect the organization of the law but the more of the judiciary.

Equally crucial was the existence of a ruling elite dedicated to the principles of these central concepts. Next to the caliph, it was primarily the newly established administrative institution of the chief justice, introduced under caliph Harūn al-Rashīd (d. 809), that was designed to guarantee a successful judicial centralization, section (b). On behalf of the caliph, chief justices, as well as some governors, were delegated the right to nominate, appoint and monitor judges.[1284] Postmasters were charged with the task to regularly report on the judges and to keep the ruling informed about the judiciary and their performances, especially in the provinces. The plan of centralization was put into practice through rules and policies generating an increasing rationalization, in short, means for judicial professionalization and bureaucratization (section two and three in this part on judges), generated by the state while allowing for simulteanous professional autonomy.

In the following it shall be seen how centralization efforts of the caliph and his ruling elite impacted the choice and the organization of the judiciary, and gave rise to a dynamic process of professsionalization and bureaucratization of the entire judicial administration.

[1283] Donner, "Centralized Authority and Military Autonomy in the Early Islamic Conquests" (2008), p. 264.

[1284] On how governors were delegated the right to appoint judges on behalf of the caliph, see Khoury, "Zur Ernennung von Richtern" (1981), pp. 207-209.

Two major Abbasid innovations indicate the centralization of the judicial system: One, it was the caliph who appointed, salaried, controlled and removed the judges (a). Two, the Abbasids introduced the legal institution of the chief justice (*qāḍī al-qūḍāt*) to centrally administer and supervise the judicial administration of the Abbasid caliphate (b).

a. Caliphal Appointment, Control, Salary, and Removal of Judges

The administration of justice was prime on the agenda of the Abbasids. Therefore it was only consequential that judges from then on were closely linked to the caliph: they were appointed, controlled, salaried and removed by the caliph as the highest judicial authority in the Empire.

aa. Caliphal Appointment of the Judiciary

The first centralizing measure was to free the judiciary from the grip of the local governor. Under the previous reign of the Umayyads (661-750), *qāḍīs* had regularly been appointed, removed from office, salaried and controlled by the local governor.[1285] Their appointment had to suit the local rationale of the governor.[1286] The governor's grip on the *qāḍī* included physical control: the *qāḍī* could not move anywhere to perform his tasks without the permission of the governor[1287], and he had to inform the governor when, where and for how long he would leave the city – as we know from accounts of renowned Umayyad *qāḍī* Shurayḥ al-Kūfī.[1288] Also, it was the governor who provided the judge with the means of his fortunes.[1289] Moreover, the governor intervened into the *qāḍī's* jurisdiction. When a governor unilaterally took over cases from a judge or refused to accept a judicial verdict, the Umayyad *qāḍī* was left to resign or sit at home as sign of

[1285] Umayyad efforts to consolidate the authority of the caliphate required measures to ensure order in the provinces. Since Umayyad caliphs could not afford to undermine the role of the regional nobility (ashrāf), regional leaders continued to enjoy great power, including the judiciary. The Umayyad caliphate sought to place limits on their authority, and judicial jurisdiction was gradually shifted from the regional governors to the qāḍīs. Conrad, "Caliphate" (1985), p. 39. This, however, does not mean that during Umayyad rule no judge was appointed by a caliph. On judicial appointments by caliphs also during the Umayyads see Khoury, "Zur Ernennung der Richter" (1981), p. 201, 203-205; Tyan, *Histoire d'organisation* (1960), p. 121-123; Schneider, *Das Bild des Richters* (1990), pp. 176-182. On judicial appointments by the first four ("righteous") caliphs, see Dannhauer, *Untersuchungen zum frühen Qāḍī-Amt* (1975), p. 43.
[1286] Ibn Saʿd, *Ṭabaqāt*, V, p. 117; al-Suyūtī, *Ḥusn al-Muḥādara*, II, p. 88.
[1287] Wakīʿ, *Akhbār al-quḍāt*, I, p. 141.
[1288] Fahd, *Al-Qāḍī Shurayḥ al- Kūfī* (2006), p. 66
[1289] Wakīʿ, *Akhbār al-quḍāt*, I, p. 141.

protest.[1290] Judiciary under the Umayyads thus was largely decentral, barely unified, and largely left the judge to defend his position and authority against the local governor.

Soon after they took control, the Abbasids took these powers of judicial administration out of the local governor's hands and from the second ʿAbbāsid caliph al-Manṣūr's reign (r. 136-158/754-775) onwards, the Abbasids elevated caliphal appointment of the judiciary to an explicit, (somewhat) systematic judicial policy element of their governing. [1291] *Qāḍīs* were centrally appointed from Baghdad as the new Abbasid capital. Those who were not appointed to their native towns, or to the capital Baghdad, were centrally sent out to the major cities and provinces of the Empire. Some careers successively took judges to such chief Iraqi cities as Basrah, Kūfah or Sāmarā', the Ḥijāzī cities of Medina and Mecca or the provinces of Syria, Egypt[1292] or Khurasān. Others were sent from one province (like Syria) to another (Egypt).[1293] There was no formalized rotation principle in place, yet the geographical mobility within the life span of some judges was remarkable.[1294] Judges were not necessarily natives or even residents of the city to which they were appointed.[1295] One effect of centralization was that judges, when sent out, they were not rooted within the communities they adjudicated nor accustomed to their respective customary laws, as was the case with former locally appointed Umayyad judges. These rotating *qāḍīs* did not belong to local communities any more. Through centralization, local judicial authorities transformed into central state officials. The rising mobility of at least parts of the judiciary was thus also a

[1290] Kindī, *Kitāb al-Wulāh*, pp. 326, 327, 356, 427. For more on Umayyad *qāḍi* see Dannhauer, *Untersuchung zum frühen Qāḍī-Amt* (1975), p. 36-70; Khoury, "Zur Ernennung der Richter" (1981).
[1291] Al-Yaʿqūbī, *Tarīkh*, III, p. 127; al-Khatīb, *Tarīkh Baghdad*, XIV, p. 103; Ibn Khalikān, *Wafayāt al-A'yān*, II, p. 243; Al-ʿAnbari, *Qāḍī al-quḍāt* (1987), p. 40. This does not mean, however, that no Umayyad caliph had previously appointed *qāḍīs* before, or that the Abbasids applied this new policy throughout. Thus, Wakīʿ states repeatedly that during the Abbasid period "it was the governors who appointed the qāḍīs", Wakīʿ, *Akhbār al-qudāt*, I, p. 184. Also, at times, appointment certificates were written in the name of the caliph and issued by the governors, or governors appointed judges and the appointment certificate by the caliph followed afterwards, see Kindī, *Kitāb al-Wulāh*, p. 379. See also Masud, "The Study of Wakīʿ's" (2008), p. 120.
[1292] For example, judge Muḥammad b. Masrūq al-Kindī was appointed in 177 by caliph Harūn al-Rashīd and was sent from Kūfa to Egypt, Kindī, *Kitāb al-Wulāh*, p. 388.
[1293] In Ibn Ṭulūn's list of (largely Shafiʿī) judges from Damascus, many are mentioned that became judges in Egypt from the the times of caliph al-Manṣūr to caliph al-Muqtadir. As an example see the biography of judge Abu Zarʿah. Ibn Ṭulūn, *Quḍāt Dimashq*, p. 15, and generally pp. 12-25.
[1294] Examples of judicial mobility include Meccan judge ʿAbd Allāh b. Muḥammad b. Safwān al-Jamaḥī was judge first in Mecca, than appoint to Medina and later to Baghdad, Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 249. Abū Ṭāher al- Aʿraj ʿAbd al-Mālik b. Muḥammad b. Abī Bakr b. Muḥammad b.ʿAmrū b. Ḥajm al-Anṣārī was first appointed to judge in Baghdad and later in Egypt were he resigned in 194, Wakīʿ, *Akhbār al-quḍāt*, III, p. 237. Most judges appointed to Egypt were from Iraq, but see also judge from Ramla, Palestine appointed to Egypt, Wakīʿ, *Akhbār al-quḍāt*, III, p. 241.
[1295] Tsafrir, *History of an Islamic School of Law* (2004), p. 90.

consequence of centralization, and brought with it its own constellations of "foreign" judges and "local" jurisoconsults, as Chapter Two had shown.

With the new central affiliation came new freedoms, and added secondary authority: From now on, the office of the *qāḍī* was linked to the caliph who embodied the supremacy of the Sharīʿa and represented the entire Muslim community[1296], and not merely to one of the many local governors and their rules. The judge now had the caliphal authorization to adjudicate. Without caliphal appointment no *qāḍī* had authority.[1297] Slightly later, jurist and scholar of administration and government Mawārdi (d. 1058 C.E.) was to theorize the delegation of authority and to sum up: "The appointment of an officer by the caliph to whom the administration of matters is completely entrusted [is valid], allowing him to make decision according to his own judgment".[1298] Judges thus derive their authority directly from the caliph; otherwise their acts are null and void.[1299] Respect owed to the *qāḍī* is thus respect owed to a delegate of the caliph.

The shift of placing the judiciary under the caliph's control rather than the governor's signifies a substantial increase of judicial independence[1300], an authority to decide free from local political pressure. [1301] An Abbasid governor had to accept the independence of the judge from the governor and not claim superior hierarchy. Yet, precisely because of this newly gained emancipation of the judge from the governor's control, chronicles document several incidents of tensions between *qāḍīs* and governors[1302] or other local statesmen[1303] on questions of authority and hierarchy.[1304] In other words, centralized judicial power was separated from local executive power.

[1296] On the caliph representing the Muslim community and appointing the judge in this capacity, Jaṣṣāṣ, *Adab al-qāḍī*, sec. 408, pp. 355-356.
[1297] Shirāzī, *Tanbīh*, p. 313.
[1298] Māwardī, *Aḥkām al-Sultaniyya*, p. 39.
[1299] Rosenthal, *Political Thought*, (1985), p. 46.
[1300] See Anbarī, *Qāḍī al-Qūḍāt* (1987), p. 6 speaking of quasi-complete independence. See also Shibārū, *Qāḍī al- Quḍāt fi'l Islām* (1988), pp. 300-303. Similarly, Bligh-Abramski, "The Judiciary as a Government Tool" (1992), p. 209.
[1301] More judicial independence from local political powers also lead to more acknowledgement of judicial leeway in the shifting debates in Germany from the 18th to the 19th century Germany, argues Ogorek, "Inconsistencies and Consistencies in 19th-Century Legal Theory" (2008), p. 158.
[1302] For example, Wakīʿ, *Akhbār al-quḍāt*, III, p. 151 on a governor (or local head) Muḥammad b. Slimān b. ʿAlī releasing a sentenced and imprisoned party against the will of qāḍī Sharīk (96-177 or 179 A.H.). The *qāḍī* successfully insisted on the return of the prisoner since he had promised caliph al- Mansūr that he could rely on the *qāḍī* fulfilling his job (of serving justice).
[1303] For example, Ṭanūkhī, *Nishwār al- Muḥādarah*, II, p. 12-17 on the confrontation of qāḍī Muḥammad b. Manṣūr and the statesman and tax-collector al-Rukhjī in the region of al-Ahwāz. Caliph al- Mutawakkil supported the authority of his judge in judging against the statesman in a case of tax fraud.

In terms of state theory, only the caliph was above the judge.[1305] Rising independence equalled rising power, in the sense that the judge became independent from all other state officials and increased his authority also over the litigants and the wider legal community such as the jurisconsults. Disputes with the judge meant disputes with a delegate of the caliph, who might or might not side with his judge. To get at the judge, meant to seek access to the caliph. This is what the jurisconsults understood, as is evidenced when the jurisconsults channeled their persuasive authority towards the caliph in questions of appointment and removal, as Chapter Two has illustrated.

Despite the caliphal taking over of the appointment of the judiciary, its procedure and result, could therefore be well affected by the persuasive authority of the jurisconsult(s) over the caliph. So while formally, the judges were independent from the jurisconsults, they effectively were not. Instead, both caliphs and judges were aware that the jurisconsults could be decisive in having a particular candidate appointed for the judiciary.

Concrete recruitment and appointment for the judiciary occurred in many ways, as the examples in Chapter Three demonstrated:

In some instances it was the chief justice recruiting and examining appropriate judicial candidates, as the chief justice was himself a legal scholar and familiar with the milieu of legal scholars suitable for adjudication.[1306] Further examples saw the caliph appointing candidates from among the recommendations for nominations he received from jurisconsults who came to represent the legal interests of their city. Often, these jurisconsults proposed candidates to the caliph and regularly succeeded with their recommendations.[1307] Other jurists came to visit Baghdad to purposely introduce themselves to the caliph as potential judges, sometimes even competing with each

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[1304] Anbari, *Qāḍi al-quḍāṭ* (1987), p. 41, Bligh-Abramski, "The Judiciary as a Government Tool" (1992), pp. 40-71.

[1305] Anbari, *Qāḍi al-quḍāṭ* (1987), p. 46. The conflict between independence and authority of the judge and his actual subordinance to caliphal government is one of the recurring themes of Islamic history, see also Mandaville, *The Muslim Judiciary* (1969), p. 5.

[1306] On chief justice Abū Yūsuf examining and appointing Mis-hir on behalf of the caliph, see Chapter Three, I. 1.a.aa. On the chief justice and his relationship to the milieu of legal scholars, see Chapter Four, I.1.b.

[1307] On jurisconsults successfully proposing judges to the caliph, see Chapter Three, I.2.a. aa., cc.,ff., jj., and Chapter Three, I. 2.b.cc., dd.

other.[1308] During the time of the *miḥna* (the trial, between 218/833 and 234/848), when the Abbasid caliphs issued the state dogma of the createdness of the Qur'ān and tested their state officials on questions of the highest state authority, state loyalty and adherence to this state dogma also played a role for judicial appointment.[1309] The Abbasid rulers also had a preference for particular schools of law from which they liked to appoint their judges. Initially, it was Medinan judges adhering to the Mālikī teachings as they were considered to be the ones who could best uphold the legal traditions as the Prophet had spend over twenty years in Medina teaching his followers in the law. Later on, and possibly due to the effect of Ḥanafī chief justice Abū Yūsuf, the Abbasids increasingly appointed Ḥanafī-Iraqi judges.[1310] Some legal scholars, it should be recalled, when approached by political authorities intending to appoint them as judges, tried to evade and hide from what they considered the "burden of adjudication", sensing a moral anxiety that they could not do justice to the litigants, and to God.[1311]

bb. Control of the Judiciary

A series of accounts illustrates the new independence of the judge by making him "the caliph's judge". Once provided with caliphal authority, the *qāḍī* regarded himself as independent of any other control, a view approved of by the caliph. The point is demonstrated by several reports of an officer of the postal and information services (*ṣāḥib al-barīd,* particularly during the reign of time caliph al- Ma'mūn, 198-218/ 813-833. ***Ṣ****āḥib al-barīd* also is the imperial communications system at the caliphs' disposal, delivering reports to the caliph on the activities in the Empire, like those of the judges'.[1312] The attempts to control were not without conflict, and the caliphs often sided with the judges.

[1308] See the Basran delegation members to the caliph competing to becoming judge, Chapter Three, I.2.a.ff. More generally on authority and competition, Chapter Three, II. 2.
[1309] On state loyalty amongst judges during the time of the *miḥna*, see Tsafrir, *The History* (2004), p. 44-50. No cases could be found where the *miḥna* created conflicts of authority between judge and jurisconsults, so that in the following the role of the *miḥna* remains limited.
[1310] On Abbasid school preference and how this affected their relationship with certain circles of scholars, see this Chapter Four, III.1.e.
[1311] On the burden of adjudication, see Chapter Two, IV.
[1312] The postmaster, *ṣāḥīb al-barīd*, allowed caliphs to send and receive anything- orders, reports, people, or even exotic fruits and snow- from one end of the caliphate to the other, both quickly and securely. See Silverstein, "On Some Aspects of the ʿAbbasid Barīd" (2004), p. 23.

For example, when in Egypt an officer of the *ṣāḥib al-barīd* attempted to sit with *qāḍī* Harūn in his court, the judge informed him that this was the court of the caliph (*amīr al-mu'minīn)* without whose authorization none might come to supervise the judicial seat. Informed by the governor of this attempt to control the judge, caliph al-Ma'mūn is reported saying that if the *qāḍī* approves of the postal officer, or anyone for this matter, to sit in his court session he could do so, without the judge's permission, however, he may not.[1313] The incident confirms the judge's independence and authority vis-à-vis other state officials.

Similarly, *qāḍī* of the Iraqi city of Wāsiṭ, Jaʿfar b. Muḥammad in 235/ 849 C.E. took an unyielding stance in his encounter with the *ṣāḥib al-barīd*. It is recorded that the postal officer wanted to attend the *qāḍī* session. The *qāḍī*, known to be strong and firm in adjudication (*ṣalb*) asked him who he was, and the *ṣāḥib al-barīd* replied that he wanted to sit with the qāḍī. The qāḍī replied: "You are coming to see in the face of all Muslims", closed his storage bag with all his legal documents (*qimaṭr*) and left. The incident reached caliph Mutawakkil who requested to see the *qāḍī* and appointed him chief justice.[1314]

In the same way qāḍī Abū Ṭāhr reacted to a writing of the postmaster who told the judge that he was slow in adjudication (*tubṭi' bil julūs*). The *qāḍī* replied that if the caliph had ordered him he would take his orders, otherwise the postmaster should mind the general affairs.[1315]

These incidents of caliphal acknowledgement of judicial standing however should not pass over the fact that the caliphs indeed sought their state officials to be monitored and controlled by the postal officers, and other state officials, and that wrongdoings or complaints should be communicated to the caliph. After all, centralization needs control. And the postal system was such a pillar of centralization.[1316] With the accession of the

[1313] Kindī, *Kitāb al-Wulāh*, pp. 444-445.
[1314] Wakīʿ, *Akhbār al-quḍāt*, III, p. 194.
[1315] Wakīʿ, *Akhbār al-quḍāt*, III, p. 237
[1316] Silverstone, *Postal Systems* (2007) p. 87-88; Tillier, *Les Cadis* (2009), p. 535-542 generally on *sāhib al-barīd* and on the postal system as an element of Abbasid centralization, Tillier, *Les Cadis* (2009), p. 543.

Abbasids, the information system was itself centralized[1317] and helped centralizing the Empire and its administration. [1318]

As provincial directors of the postal services, the *ṣāḥib al-barīd* served also as intelligence officers and inspectors for the centralized government. [1319] They are what made caliphal control over the judiciary possible. [1320] Thus based on the postal reports to the caliphs, judges could be removed from office.[1321] So when, for instance, negligence and carelessness in aging judge al-ʿŪfī increased and was reported by the postmaster to caliph al-Rashīḍ, the latter removed him from office.[1322]

The actual control that the caliph was able to exercise over the judges via the postmasters remains unclear. Although the sources reveal that the postal officers monitored and shared information on work efficiency, reputation, additional jobs and incomes, and suggests a tight control, the postal officers are overall seldomly mentioned in cases of judicial removals from office.[1323] However, the *barīd* played a key symbolic role: he was a daily reminder that the judiciary's authority entirely depended on the caliph's, the highest judicial authority. The *qāḍī* was a man of authority, and just like the provincial governor and the treasurer of finances, he was *qua* title and official authority included in a network of surveillance without which the centralisation envisioned by caliph al-Manṣūr would not have been possible. His status of civil servant and the authority which

[1317] The postal system, which had been in existence since the days of it Achaemenid founders (ancient Persian dynasty overthrown by Alexander the Great), was reorganized under the Abbasids and supplemented with a carrier-pigeon service and a network of semaphore towers stretching from Baghdad to Morocco, see also Spuler, *The Muslim World* (1960), pp. 51-52; Silverstein, *Postal Systems* (2007), p. 91.
[1318] Already with the final years of the Umayyad reign a delicate distinction between the existence of the *barīd* and the successful transmission and analysis of intelligence reports was introduced Silverstein, *Postal Systems* (2007), p. 87.
[1319] Under the early Abbasids, the *barīd* was used for the purposes of internal surveillance to an unprecedented extent. Caliph al- Manṣūr, in particular, made what was deemed by some to be excessive use of the *barīd* in spying on his subjects, including his judges. Ṭabarī, *Ta'rīkh*, IV, p. 520. See also ʿAsqalānī, *Raf' al-iṣr min quḍā miṣr*, p. 255, where numerous references to al- Manṣūr's obsession with *barīd* reports are provided. Silverstein, *Postal Systems* (2007), p. 88; Tillier, *Les Cadis* (2009), p. 535.
[1320] Al-Ṭabarī, *Ta'rīkh*, III, p. 435. The caliphs liked to keep themselves well-informed of developments in the provinces. Postmasters wrote day and night (quite literally, as al-Ṭabarī tells us) to caliph al-Manṣūr, reporting on the prices, and - significantly – on the *qāḍī's* decisions.
[1321] See for instance the account on judge of Egypt Abū al-Ṭāher ʿAbd-Al-Mālik b. Muḥammad al-Ḥazamī who served from 170-174, was forced to resign from his *qāḍī* position based on (biased) information delivered by the postmaster to the governor, though the judge had rejected to be monitored by the postal officer without the caliph's request, Kindī, *Kitāb al-Wulāh*, p. 384, and a slightly different report focusing on the resignation on p. 385.
[1322] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 267.
[1323] Tillier, *Les Cadis* (2009), p. 542. Zaman, *Religion and Politics* (1997), p. 201 suggests that Abbasid caliphs were worse informed on the qāḍīs than they had wished. For example, Egyptian judge ʿAbd Allāḥ b. Lahīʿa (d. 174/790) who, despite his probable Shiʿite tendency and his anti-Abbasid position, remained judge under both caliphs al- Manṣūr and al-Mahdī.

he owed to the sovereign made him one of the privileged centralization instruments of the caliphate.[1324]

Though there is no explicit evidence of the caliphs demanding the jurisconsults to monitor the judges and report to the caliph, we know through the cases presented in Chapter Two that the jurisconsults did not shy away from reporting to the caliph when they saw the judge passing judgments contrary to what they saw fit for their town or region.[1325] Thus, it was thus also the jurisconsults of the provinces fulfilling the task of monitoring and reporting on the judges to the caliph.

cc. Salary

As a further aspect of centralization, judges were from then on the caliphal pay roll, paid from the treasury (*bait al-māl*), not on the governor's budget anymore.[1326] The judge's means of fortunes were tied to the caliph, establishing a new, central dependence.[1327] But this was also an acknowledgement of adjudication as a general good: The judicial chronicles and Abū Yūsuf's famous early treatise on taxes[1328] lay it down that the *qāḍī*'s salary should come from the public treasury, reflecting that the judge performs a public duty.[1329] Fees legally payable by litigants are not mentioned in the judicial chronicles, so that adjudication was in effect entirely provided by the Abbasid caliphate.

In fact, the salaries steadily increased, and with them the standing of judges in public.[1330] However, the salaries were not uniform and could differ from judge to judge, from city to city and from time to time. *M. Tillier's* meticulous study of the *qāḍī's* salaries in the Iraqi cities shows above all that centralization was not synonymous with standardization:

[1324] Tillier, *Les Cadis* (2009), p. 542.

[1325] See, e.g., the jurisconsults documenting the mistakes of judge Khālid on the laws of testimony and reporting them to the caliph which lead to the judge's removal from office, Chapter Three, I.2.a.bb. See also the report of the Egyptian jurisconsult Layth b. Sa'd to the caliph on what he considered *qāḍī* 'Isma'īl's wrong adjudication on property law, see Chapter Three, I.2.b.aa.

[1326] Tillier, *Les Cadis* (2009), p. 264-265.

[1327] On the political authorities desiring to create a link between high judicial salaries and clear loyalty (to the office), briefly Ogorek, *Richterkönig oder Subsumtionsautomat ?* (1986), p. 27. More on the link between salary and loyalty, see the discussion of full-time occupation, salary and judicial professionalization in this Chapter Four, I..2.f.

[1328] Abū Yūsuf, *Kitāb al- Kharāj*, p. 115.

[1329] Reports also mention judges who were not paid any salary, as a sign of piety see Al-Qadi, "The Salaries of Judges in Early Islam" (2009), pp. 9-30, particularly p. 12.

[1330] For a detailed analysis of rising judicial salary from the end of the Umayyads (750 C.E.) to caliph al-Ma'mūn (d. 833 C.E.) in the cities, Kufa, Basra and Wasit, see Tillier, *Les Cadis* (2009), pp. 263- 272, in particular pp. 264-268. Tillier attests that the highest salary was paid in the Iraqi city of Kufa, compared to the Iraqi cities Basra and Wasit.

although the caliph determinated the amounted salary for the *qāḍīs*, they did not all receive identical sums and the first Abbasids did not fix a uniform salary. The salary was not only individual but also transparent; the judicial chronicles document each judge's salary and so the diversity and the increase quickly become obvious.[1331] It might be, so *Tillier*, that the difference is a legacy of the governors' ability to freely assess the salary of the judge.[1332] The increase might well be ascribed to counter the effects of inflation.[1333] An increase of salaries, even if also to counter inflation, is surely also an acknowledgment of the task of adjudication, and might be accompanied by an increasing public significance. In fact, *R.G. Khoury* explains this tendency with a strengthening and centralizing of the structures of the caliphate, which increasingly valued the key functions of the administration of the state.[1334] High salaries also reflect a gradual professionalization, adapting the salaries to a full-time profession so that the judge could and should dedicate themselves entirely to adjudication without having to exercise additional jobs.[1335]

dd. Removal from Office

The judicial system was one of the main pillars of the caliphate and of his legitimacy. Serious complaints and criticism of a *qāḍī* therefore threatened the stability of Abbasid rule and were thus considered a sufficient reason to remove the judge from office. Parallel to judicial appointments, it was only the caliph who could remove the judge from office.

Judges were not independent of the caliph's control, enjoyed no comprehensive independence from the caliph or immunity. Judicial chronicles meticulously document

[1331] For example, Eyptian judge Abdallah b. Lahīʿa (d. 174/790) was awareded 30 dinar per month, Kindī, *Kitāb al-Wulāh*, p. 369. Around twenty years later, the salary of Fusṭāṭ's (Egypt) judge, al-Faḍl b. Ghānim, was 168 dinars a month in 198/813. Kindī, *Kitāb al-Wulāh*, p. 421. For other salaries, see for example ibid., p. 435 and Wakīʿ, *Akhbār al-quḍāt*, III, pp. 187, 242. On the steady rise of salaries see, Hallaq, *Origine* (2005), pp.97-98; Johansen, "Wahrheit und Geltungsanspruch" (1997), p.983.

[1332] See for example, Wakīʿ, *Akhbār al-quḍāt*, p. 268. Tillier, *Les Cadis* (2009), p. 268.

[1333] The amounts of money received by the *qāḍīs* of Iraq rose in a considerable way in the course of the Abbasid period: their monthly salaries were multiplied by five in less than a century, and arrived at round 50 dinars in the fourth/ tenth century. Shaban, *Islamic History* (1971), II, p. 56, 60. Tilliers, *Les Cadis* (2009), p. 268.

[1334] Khoury, "Activités scientifiques" (1994), p. 63. See also Mez, *The Renaissance of Islam* (1937), p. 221. Tillier, *Les Cadis* (2009), p. 268.

[1335] Tillier, *Les Cadis* (2009), p. 269.

when a judge was removed and how long he had served the judiciary. The span of the judicial tenure varied considerably, from a few months to several decades.[1336]

In Khaṣṣāf's normative writings (see Chapter Two), a judge's decisions are void (*mardūd*), and reasons for removal are given when a judge turns out to be a slave, a non-Muslim, sanctioned with a *ḥadd*-crime, blind, or corrupt.[1337] Death or the ousting of a ruler are no reason for removing the judge, as the ruler acted as representative of the Muslim community.[1338]

Actual reasons for removal, however, are much less often documented. In only 22 cases of all removals in Iraq from 750-945 reasons were given for, nine of them related were related on complaints by local jurisconsults.[1339]

Even when judges themselves asked to resign, their resignation request had to be accepted by the caliph to be valid, and judges could not always be sure that the caliph would be willing to release them from office. [1340]

Whether the lack of further documentation in the reasons of removal might was because the chroniclers were not interested but for the extraordinary cases of removals or because it was an regular act, happening so often as to not be further noticed, can only be speculated about.

Significantly, the caliph could not interfere or review the judge's verdict. Review of judgments was restrained, as laid down in Chapter Three, and possible only when the verdict violates the Sharīʿah on obvious grounds.[1341] In fact, because of the limited options of judicial review, *Schneider* assumes that the caliphs opted to remove the judge

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[1336] See the lists of *qāḍī* tenures for major cities and regions of the early Abbasid reign, Tsafrir, *History of an Islamic School of Law* (2004); for example, judges of Baghdad, pp. 50-53, judges of Egypt, p. 103. As some governors were removed after short periods to prevent them from building up local influence, it is unclear if some judges were removed for similar reasons after a short while. On the short governing periods of governors during the height of caliph Harūn's centralization policies, see Kennedy, *The Early Abbasid Caliphate* (1981), p. 118.

[1337] Khaṣṣāf, *Adab al-qāḍī*, sec. 406, p. 354, see the criteria of eligibility of judge in Chapter Two, V.1.a.

[1338] Khaṣṣāf, *Adab al-qāḍī*, sec. 408, p. 355; Schneider, *Das Bild des Richters* (1990), p. 234-237.

[1339] On removals based on complaints from jurisconsults, see Chapter Three, I.2.a.bb., dd., ee., ii.,jj., and Chapter Three, I.2.b.aa. See also the table of removals, Tillier, *Les Cadis* (2009), p. 242.

[1340] *Qāḍī* Sharīk had requested a friend to ask caliph al-Manṣūr to discharge him from his *qāḍī* post. The friend, father of Isḥāq b. ʿIsā refused to mediate, saying that the caliph does not change his wishes. When caliph al-Mahdī took over office, the mediator said that al-Mahdi was more flexible and might respond to Sharīk's wish for resignation. Sharīk however changed his mind and refused to ask for his resignation, fearing that his enemies would destroy his reputation if he did ask for his resignation, Wakīʿ, *Akhbār al-quḍāt*, III, p. 153. Exampels for resignation see the case of *qāḍī* Abū Ṭāher al- Aʿraj ʿAbd al-Mālik b. Muḥammad b. Abī Bakr b. Muḥammad b.ʿAmrū b. Ḥajm al- Anṣārī, Wakīʿ, *Akhbār al-quḍāt*, III, p. 237. See further examples, Chapter Three, I.2.a.jj.

[1341] Masud, "Al-Khaṣṣāf", *EI3*.

from office.[1342] Short tenures speak for the fact that not even the caliph could exercise review authority. Caliphs, however, could remove judges at any time without having to mention reasons.
The maximum of interference was the dismissal of the judge –as *qāḍi* Aḥmad b. Badīl al-Shāmil ascertained when refusing to bow to the wishes of a prince:"God is the Lord of both worlds, is there anything [more to expect] than removal from office?"[1343]

It should be noted, that a removal from office or a judicial request to resign did not mean that the judge could not be re-appointed. After a while, the judges could either be re-appointed to the same city or send to different parts of the Empire. For example, Muḥammad b. ʿAbd Allāh al-Anṣārī was appointed *qāḍī* of the Iraqi city of Baṣra twice.[1344] Egyptian judge Ghawth b. Sulaymān in Egypt was even appointed three times. [1345]

The removal from office thus did not need to be final, and instead temporary, as a judge could later be re-appointed again, to the same city or to a different part of the Empire.

Centralization once more translates into a strong authority of the judge since no one but the caliph could articulate his removal from office. The formal removal order (orally or in writing) was centrally issued by the ruling authority.
Though the judge enjoyed no fixed tenures or life-time tenures, independence from all other public authorities, like governors, police, etc. was guaranteed.

[1342] See also Schneider, *Das Bild des Richters* (1990), p. 236-237.
[1343] Wakīʿ, *Akhbār al-quḍāt*, I, p. 22. The quote should not neglect the fact, that judges could have a worse fate than removal, that of imprisonment, for example in the case of political dissent with the caliph or the chief justice, as the example of judge Bishr shows, who was imprisoned because of his critique of the Abbasid ruling house, Kindī, *Kitāb al-Wulāh*, p. 362, or possibly because of his correspondence with ʿIbādis as political opponents of the Abbasid caliphate or possibly because he hid someone in his home, see Wakīʿ, *Akhbār al-quḍāt*, I, p. 22.
[1344] On the jurisconsults interfering in *qāḍī* al-Anṣārī's appointment, see Chapter Three, II.2.a.bb. *Qāḍī* Muḥammad b.ʿAbd Allāh al-Anṣārī was appointed in 181-192/806-807 and again from 198/813 to 202/817-18, see Wakīʿ, *Akhbār al-quḍāt*, II, p. 151, 157; al-Ṣaymarī, *Akhbār Abī Ḥanīfa*, p. 164; al-Khatīb, *Ta'rīkh Baghdād*, III, p. 25, 28; Ibn Abī l-Wafā', *al- Jawāhir al-muḍiyya*, II, p. 70.
[1345] On judge Ghawth's adjudication, see also Chapter Three, I.2.b.aa.;bb., and Chapter Three, II. 6. c. Judge Ghawth's first tenure was in 135, he then resigned to leave for Damascus with governor Sāliḥ b.ʿAlī, and returned to Egypt. He was then appointed a second time after the passing away of his predecessor in 140 or 144. Kindī, *Kitāb al-Wulāh*, p. 358, 361. His last and third tenure in 167 was under caliph al-Mahdī and lasted one year until he died in 168. Kindī, *Kitāb al-Wulāh*, p. 373. Further examples of judges reappointed were Al-Mufaḍḍal b. Faḍālah, who was appointed twice. In his second tenure, he was appointed by the governor of Egypt which was followed by the appointment certificate of caliph Harūn al-Rashīd in 174, Kindī, *Kitāb al-Wulāh*, p. 385. Lahīʿah b. ʿIsā al-Ḥaḍramī in his first tenure in 196 was appointed by (governor?) ʿAbbād b. Muḥammad. He was appointed to the second tenure, in 199 until 204 by Muṭallib, Kindī, *Kitāb al-Wulāh*, p. 417, 426. Judge al-Mufaḍḍal (Chapter Three, I.3.c.) was also re-appointed to Egypt.

Chapter Three has documented, though, that despite the caliph's final say in appointment and removal, it was the jurisconsults' impact on the caliph that in some cases successfully affected his decision. Jurisconsults indirectly could influence this decision, while formally the caliphs centrally kept in charge of the composition of the court.
Though the jurisconsult himself had no coercive authority over the judge, he nevertheless had quasi-coercive authority, by influencing someone who had coercive authority himself, namely the caliph, to affect the judge. The judge's authority was thus dependent on the caliph's, and yet not independent from the local setting: the local jurisconsults, and their backing by the population.

b. Introducing the Office of Chief Justice (*Qāḍī al-Quḍāt*)

Centralization gathered pace during the reign of the famous Abbasid caliph Hārūn al-Rashīd (r. 170-193/786-809). He further reinforced centralization by introducing the office of chief judge (*qāḍī al-quḍāṭ*) to the Abbasid reign.[1346] The *qāḍī al-quḍāṭ's* task was to assist the caliph in directing the judicial administration of the Empire. As first chief judge in Islamic legal history, Hārūn al-Rashīd appointed the renowned Ḥanafī jurist and *muftī* Abū Yūsuf (d. 182/ 798) who took his office in the capital Baghdad. The choice of this renowned jurist as a supreme legal reference of the Empire underlines the Abbasid's wish to put the judicial system, as well as overall Abbasid rule, under legal auspices. It can also be read as Abbasid preference for the Ḥanafī school of law.[1347]

The list of the chief judge's tasks might be divided in legal and representative assignments. Legal tasks included advising caliph in judging cases involving ministers (*wuzarā'*) and people threatening the security of the state, and supervising and adjudicating over claims of complaints (*al-nazar fi al-mazālim*), writing the official

[1346] It is argued that the office of *qāḍī al-quḍāt* followed the Persian model of *mobidhan mobiz* and that caliph Hārūn al- Rashīd and his predecessor al- Manṣūr were in general inspired by the more centralized Sasanian model of judicial and financial administration of nearby Persia. For the model of the Sassanian empire of Persia (226-643 C.E.) model: Conrad, "Caliphate" (1985), p. 44; Gibb, "The Evolution of Government" (1955), p. 36. Considering the *qāḍī al-quḍāṭ* a genuinely Abbasid concept: Shibārū, *Qāḍā' wa al-quḍāt* (1988), p. 18. Similarly, seeing no Sassanian influence in *qāḍī al-qūḍāt* institution, Dannhauer, *Untersuchungen zur fürhenn Geschichte des Qāḍī- Amt* (1975), pp.102-103; Bligh-Abramski, "The Judiciary as a Government Tool" (1992), p. 56 considers the introduction of the chief justice a truly novel and relevant judicial reform.
For an overview of the discussion on the institutional origine of the chief justice (*qāḍī al-quḍāt*), see Tillier, *Les Cadis* (2009), p. 426- 433.
[1347] On Ḥanafī preference, see this Chapter Four, III. 1.e.

treatise of the caliph's inauguration (*bay'ah)* and his removal from office *(khal'*), setting up engagement and marriage contracts of caliphs and princes, supervising the market-inspection (*ḥisba*), as well as advising the caliph and higher state officials by issuing requested legal opinions (*futya*).[1348] Despite some adjudicative tasks, the chief justice did not constitute a higher degree of jurisdiction, since he was not entrusted with an appellate power.

Soon after the establishment of Abbasid rule and with increasing caliphal efforts necessary to control the seat of power and the need for a growing number of judges to solve the increasing complexities of life, caliph Hārūn al-Rashīd also delegated his prerogative of judicial appointment and removal to the chief justice. Many judicial appointments were made at the recommendation of the chief justice at the royal court.[1349] Even though the chief judge recruited or selected the judges or handed over the certificates of appointment, the caliphs did not renounce their authority over the judges, they merely delegated their authority to the chief justices.[1350] Also, despite this delegation, caliphs did not withdraw from judicial administration but themselves regularly took part in interviewing, selecting and appointing judges in person.[1351]

Representative tasks ranged from requesting amnesty on behalf of others from the caliph or from a minister, accompanying the caliph to the pilgrimage or other important travels, leading Friday prayer and giving sermons, and supervising mosques, as well as teaching.[1352]

Despite these multifarious tasks, chief justices were concerned and widely regarded as having essentially administrative functions. Their role was largely commented upon by their contemporaries and the secondary literature as political actors, given their influence on the caliph's decisions on ruling the Empire.[1353]

[1348] See in detail with further references Shibārū, *Qaḍā' wa al-Quḍāt* (1988), pp. 107-116.
[1349] Wakīʿ, *Akhbār al- quḍāṭ*, III, p. 251.
[1350] Examples for chief justices in recruiting judicial candidates to the judiciary, and handing over appointment certificates, with particular reference to chief justices requesting judges to seek judicial consultation, see Chapter Three, I.1.a.aa and Chapter Four, I.2.c (entry examination by chief justice)
[1351] See the joint examination of caliph and chief justice of judicial candidates, Chapter Four, I.2.c.
[1352] See in detail with further references Shibārū, *Qāḍā' wa al-Quḍāt* (1988), pp. 116-124.
[1353] Tillier, *Les Cadis* (2009), pp. 443-461.

Chief justices were chosen and appointed by the caliphs, they were predominantely from the Ḥanafī school of law, and were all *qāḍīs* before acting as chief justices.[1354] Given the chief justices' background in the legal scholarly circles, they knew the circles of the jurists well. As there was no institutionalized mechanism of recruitment in place, chief justices advised and consulted with the caliphs on how to attract scholars to the judiciary and to the administration.[1355] For example, caliph Al-Ma'mūn had requested chief justice Yaḥya b. Aktham to choose for him the most renowned jurists (*fuqahā'*) and traditionists of Baghdad and to bring them to the caliphal court. [1356] Chief justice Abū Yūsuf pre-selected and examined judicial candidates before they were appointed judges.[1357]
It was also caliph al-Ma'mūn who had chief justice Yaḥya b. Aktham consult him about the legal scholars whom the chief justice had known on his previous post of judge in Basra. Following the recommendation and praise of the chief justice, the caliph requested the jurist (*faqīh*) Sulaymān b. Ḥarb (d. 224/839) to come to Baghdad: the Basrian jurist was introduced to the court and saw himself later appointed *qāḍī* of Mecca.[1358] Yaḥya b. Aktham recommended to him also other jurists, such Aḥmad b. Du' ād, when al-Ma' mūn to practise as judge of the court of complaints (*maẓālim*).[1359]

Most often, the role of the chief justices had a central say in the designation of the *qāḍīs* of provinces. In this, their role was similar to that of the jurisconsults and jurists (*fuqahā'*). The chief justices prime role was to act as a deputy of the caliph in supervising the make-up of the judiciary.[1360] When a *qāḍī al-quḍāt* acquired important influence on the sovereign, the opinion could exceed a simple recommendation and become decisive. This is what seemed to have happened in the case of Ibn Abī Du' ād, chief justice (*qāḍī al-quḍāt*) of caliphs al-Muʿtaṣim and of al-Wathīq, to which Ibn Khallikān links the direct nomination of the *qāḍīs* of the provinces.[1361] But most often, the chief justice's role was first of all that of an adviser: His words counted for very

[1354] On the chief justices under the Abbasids, see Wakīʿ, *Akhbār al-quḍāt*, III, p. 294, 303. Of the early Abbasid chief justices of the 8th and 9th century allwere Ḥanafī except for Abū al-Bakhtarī (appointed in 182/798) who was Medinan.
[1355] See also Zaman, Religion and Politics (1997), pp. 160.
[1356] Ibn Tayfūr, *Kitāb Baghdād*, p. 45, Tillier, *Les Cadis* (2009), p. 440.
[1357] See the example of chief justice Abū Yūsuf examining judicial candidate Mis-hir, Chapter Three, I.1.a.aa.and see the examination as part of judicial professionalization in Chapter Four, I.2.c.
[1358] Ibn Khallikān, *Wafayāt al-ʿayan*, VI, p. 150; Wakīʿ, *Akhbār al-quḍāt*, I, p. 268. Tillier, *Les Cadis* (2009), p. 440.
[1359] Wakīʿ, *Akhbār al-quḍāt*, III, p. 294. Tillier, *Les Cadis* (2009), p. 440.
[1360] Schneider, *Das Bild des Richters* (1990), p. 229, 241; Tillier, *Les Cadis* (2009), pp. 131-135.
[1361] See Ibn Khallikān, *Wafayāt al-aʿyan*, I, p. 398; Tillier, *Les Cadis* (2009), p. 440.

much but were not always requested or followed.[1362] If their role was less influential, as often assumed in the process of nominating judges, they nevertheless played a siginificant and novel role as legal advisers to the caliph, and were a prime reference for the judicial system of the Abbasids, administering and supervising the judicial needs of the Empire.[1363] Their influence on the judiciary differed from that of the jurisconsults because, often, the jurisconsults were many in numbers, locally close to the judges, and always in immediate competition over the course of the law and judicial posts.

There are barely any cases documented where the chief justice attempted to give instructions on law to judges. In one case chief justice Yaḥya b. Aktham disagreed with judge of the Iraqī city Madinat al-Manṣūr (Baghdad), Bishr b. al-Walīd al-Kindī on questions of testimony based on another testimony (*al-shahāda 'ala shahāda*). While the chief justice had previously established the credibility of the witness, judge Bishr had refused to accept that person's testimony. The case was brought to the attention of caliph al-Ma'mūn who requested to see the judge and told him that if the chief justice had previously established the credibility of the witness, then there was need for the judge to re-examine the witness. Judge Bishr however told him that he could not accept this person's evidence if he came to testify in front of him, even if the chief justice had accepted his testimony. The caliph got angry with judge Bishr, removed him from office and had the chief justice continue adjudication while retaining his position as chief justice.[1364]

While in this case the chief justice thus retained the upper hand in this legal dispute with the judge, there is barely any other example of chief justice ordering the following of particular substantial rule of law. Despite this example, of chief justices holding court sessions, adjudication was not part of their official tasks, or did they act as institutionalized instances of revision.[1365]

[1362] Despite the high repute of chief justice Abū Ḥanīfa, caliph al-Rashīd did not always follow his recommendations: towards 177/793-94, the *qāḍī* of Kūfa, Ḥafs b. Ghiāth al-Nakhā'ī, was appointed "without Abū Yūsuf being consulted, which deeply affected the latter." Ibn Abī al-Wafā', *al- Jawāhir al-muḍīyya*, I, p. 22, Tillier, *Les Cadis* (2009), p. 440. For further examples of caliphs acting without or against chief justice's advice, see Tillier, *Les Cadis* (2009), p. 441.
[1363] Bligh-Abramski, "The Judiciary as a Government Tool" (1992), p. 56.
[1364] Wakī', *Akhbār al-quḍāt*, III, pp. 272-273.
[1365] Schneider, *Das Bild des Richters* (1990), p. 241.

The chief justices' role, however, was central for the debate whether the chief justices preferred a particular school of law that encouraged legal scholars of a particular school to opt for the judiciary. Some historians of Islamic law assumed that starting with second/ eighth century the Abbasids pursued a pro-Ḥanafī policy, in particular through occupying the office of *qāḍī al-quḍāṭ* with prominent Ḥanafī jurist Abū Yūsuf under caliph al-Rashīd.[1366] In fact, the tendency to increasingly appoint Ḥanafī *qāḍīs*[1367] already became clear with the designation of Abū Yūsuf for the judicial post in Baghdad under caliph al-Hādī[1368], and was merely confirmed by his appointment as chief justice under caliph al-Rashīd. This is why *N. Tsafrir* thus suggests that the "*qāḍī al-quḍāt* was more effect than cause for the Ḥanafī spread"[1369] in the judiciary, and in scholarly circles.

c. A Delicate Balance: Delegated Authority

State theory largely rested on the principle of delegation (*wilāya*), the delegation of powers from a single supreme authority, the caliph.[1370] This delegation entailed a delicate balance between independence and hierarchy. An Abbasid judge had coercive, sanctioning and binding authority. This flows from the very understanding of adjudication as a way to terminate legal conflicts in society. Like all government functionaries, judges were appointees and representatives of the caliph and derived their authority directly from him. Without caliphal authorization to adjudicate, indicated through the caliphal appointment certificate, judicial acts were considered null and void.[1371] *Qāḍī* ʿAbd al-ʿAzīz b. al-Muṭṭalib's (d. 141/ 757) statement "I am his judge and my judgment is his judgment"[1372] asserts the basis of caliphal authority.[1373]

Self-understood notions of caliphal authority shed light on judge's authority as a representative of the caliph. In Abbasid state theory, obedience owed to the caliph is identical with obedience owed to God.[1374] Obedience owed to the judge is obedience

[1366] Ibn Khallikān, *Wafayāt al-a'yān*, VI, p. 144. See also Tyan, *Histoire de l'organisation judiciare* (1960), p. 173. Coulson, *History of Islamic Law* (1964), p. 37.
[1367] For the gradually increasing appointment of Ḥanafī *qādis* starting with caliph al-Mahdī and in particular caliph al-Rashīd in the Iraqi cities and provinces, see Tsafrir, *The History* (2004), p. 178; Johansen, "Wahrheit und Geltungsanspruch" (1997), p. 999. Tillier, *Les Cadis* (2009), p. 153.
[1368] Wakīʿ, *Akhbār al-quḍāt*, III, p. 254. Tillier, *Les Cadis* (2009), p. 153.
[1369] Tsafrir, *The History* (2004), p. 21.
[1370] Bligh-Abramski, "The Judiciary as a Government Tool" (1992), p. 43.
[1371] Rosenthal, *Political Thought* (1985), p. 46.
[1372] Wakīʿ, *Akhbār al-quḍāt*, I, p. 204.
[1373] Masud, "The Study of Wakīʿ's" (2008), p. 120.
[1374] Rosenthal, *Political Thought* (1985), p. 45.

owed to the caliph. The judge was part of the caliphal state, and assigned to partake in the legal and religious authority of the caliph. Religiously speaking, the caliph is the defender of the faith, the dispenser of justice, the leader in prayer. The caliph is bound by the Sharīʿa to accomplish these duties in a loyal and effective way, either in person or by delegating his authority to his appointed officials, chief among them minister (*wazīr*) and the judge.[1375]

Similarly, the judge would not only judge according to the Sharīʿa and dispense justice but also lead Friday prayer, attend funerals, visit the sick – his religious and charity obligations were recurring themes in the *adab al-qāḍī* literature and were also documented throughout in the judicial chronicles.[1376] The judge was expected to lead a morally and religiously impeccable life so that he could function as a dispenser of justice, representing the caliph also in religious and moral claims.[1377]

The Abbasid change of judicial policy, namely the centralization of the judgeship position, meant an Islamization of the judicial system: The judge was put under the immediate hierarchic authority of the caliph, he became a direct representative of the caliph in the middle of the city. This change introduced a policy of "Islamization" carried by the Abbasids, who had wanted to set themselves apart from the Umayyads and to legitimize their taking of power. By determining the make-up of the judiciary in the Empire, the caliphs presented themselves as the guarantors of (divine) justice, guarding those who seek protection through the laws of God. [1378] A figure of law and religion, the role of the *qāḍī* is thereby also one that legitimized Abbasid rule.[1379]

The underlying theory of authority is that of a "delegated authority" as later developed by theorist and legal scholar al-Māwardī (d. 450/ 1048).[1380] Al-Māwardī consolidated much of earlier Islamic political thought in his various works on the subject, and in this sense can shed light on the earlier period here under study. [1381] While he was often read as speaking for the interests of the religious scholars, his work exhibits a strong concern

[1375] Rosenthal, *Political Thought* (1985), p. 26.
[1376] See for example, Shāfiʿī, *Kitāb al-umm*, VI, p. 220. Judges leading Friday prayer, see for example *qāḍī* of Egypt Ismaʿīl b. Yasā', Kindī, *Kitāb al-Wulāh*, p. 372.
[1377] See the moral and religious prerequisites of the judge in the *adab al-qāḍī* literature, Chapter Two, V.1.a.
[1378] Tillier, *Les Cadis* (2009), p. 273.
[1379] Tillier, *Les Cadis* (2009), p. 543.
[1380] Rosenthal, *Political Thought* (1985), p. 48.
[1381] Heck, "Law in ʿAbbasid Political Thought" (2004), p. 87.

for the administrative institutions of the State, including his most celebrated work, al-Aḥkām al Ṣulṭāniyā ('The Rules of Governance'). [1382] According to Māwardī's state theory, the entire state apparatus is an executive organ of the caliph's authority. The delegation of authority from caliph to his representatives is necessary for (merely) organizational reasons.[1383] This way, judges are not only state functionaries but also both share and uphold the caliph's authority by dispensing justice under the auspice of the caliph. At the same time, judicial independence was a strong concern.[1384]

This is noticed by Māwardī himself who, under the title of "interruptions during court sessions", re-counts the following incident between caliph al-Mahdī (d. 169/785) and Basran judge al-ʿAnbarī (d. 168/784-5) [1385] in his prominent *adab al-qāḍi* work, in which he elaborates and developed further Shāfiʿī's ideas on the etiquette for the judge.[1386] Māwardī explains that the decorum of the judge is signified by an appropriate way to speak, to greet or show respect to those present in the court session. When the litigation parties enter the court sessions, so Māwardī, the *qāḍi* should have his head lowered, regardless of the rank of the litigant. As an example, Māwardī illustrates an incident where caliph al-Mahdī during his reign entered the court session of al-ʿAnbarī together with the opposing litigants. When the judge saw him enter, he lowered his eyes until all litigation parties took their seats. After the session had ended, the judge rose up and stood in front of the caliph. Caliph al-Mahdī said: "By God, if you had risen as I entered, I would have removed you from office. But if you had not risen after the court session, I would have also removed you from office." The first removal from office would have occurred lawfully (*mustaḥaqq*) because the judge before adjudication would have risen to honor the caliph and would have thus favored him. The second removal would have occurred because, had the judge not risen in respect, he would have acted against a right of the caliph, within the etiquette of proper behaviour (*adab*).

In this incident, judge al-ʿAnbarī mastered the ambiguous relationship to the caliph. The court session began with the judge being superior to the caliph who was treated like any

[1382] Heck, "Law in ʿAbbasid Political Thought" (2004), p. 87.
[1383] Al-Māwārdī, *Aḥkām al-Sultaniyya*, p.15.
[1384] Schneider, *Das Bild des Richters* (1990), pp. 244-245.
[1385] On ʿUbaydallāh b. al-Ḥasan Al-ʿAnbarī, see Wakīʿ, *Akhbār al-quḍāt*, II, p. 88. Caliph Mansūr appointed him judge in Baṣra, as a successor to judge Sawwār. Sawwār was appointed judge in 138/ 755 or 140/ 757, Wakīʿ, *Akhbār al-quḍāt*, II, p. 65.
[1386] Māwardī, *Adab al-qāḍī*, sec. 393. The incident is translated into German by Schneider, *Das Bild des Richters* (1990), pp. 76-77.

other litigation party, and it the court session ended with the judge returning a representative of the caliph.[1387] In judicial questions, caliphal authority had to bow to judicial authority, and respect the rule of law.

The delicate balance of the independence of the judge from the caliph as well as his delegated authority is a theme that similarly occurs in the appointment certificate of the year 157/774 of judge al-ʿAnbarī. In Wakīʿ's judicial chronicle the appointment certificate states that the ruler has appointed al-ʿAnbarī based on his power (*tawq*) that was bestowed on the caliph by God, and that he has spared no effort and selected al-ʿAnbarī because of his qood qualities. The judge should obey the ruler but only in so far as the commands are in accordance with God's commands. He should not blindly follow the ruler in sin. The judge must struggle against his human weaknesses (his soul). [1388]
The certificate reiterates the idea of delegated authority, as the ruler stresses that he appointed (*qalladtuka*, *wallaytuka*) the judge based on the powers the ruler was granted from God. Though the idea of "delegated authority" was upheld in the appointment certificate, it find its limits in unlawful, sinful commands. The judge needs to retain his independence from the caliph to be able to dispense justice, and cannot simply refer to him as a higher authority he can blindly follow.[1389] The judge should always be ready to fight his weaknesses, which possibly refers to the dangers and risks of moral and financial corruptions in the position of authority.

Delegation and independence (from the caliph as well as local political authorities) are delicate aspects in the relationship of the *qāḍī* to the caliph. They both define the authority of the judge: untouchable by any other local and/or political authority because he is under the protectorate of the caliph, and yet an appointee, whose fortune is dependent on the goodwill of the caliph. Consciousness for justice however puts limits to the concept of "delegated authority": The judge needs to rely on his own expert authority independent of the caliph when the scope and boundaries of the Shārīʿ a are under discussion. Then the judge has to rely on his qualities, his moral and religious integrity and his legal qualifications.

[1387] A similarly prominent case of the caliph respecting the independence of the judge occurred with caliph ʿUmar b. Khattāb, who sought justice and bowed to the verdict of judge Zayd b. Thābit. Schneider, *Das Bild des Richters* (1990), p. 81.
[1388] Wakīʿ, *Akhbār al-quḍāt*, II, p. 91.
[1389] Schneider, *Das Bild des Richters* (1990), p. 184.

On a political level, for instance, it is not surprising to see during the *miḥna* period (trial period, sometimes translated as Inquisition, lasting from 833 to 848 C.E.) the caliphs employing the *qāḍīs* also to spread their state doctrine of the doctrine of the createdness of the Qur'ān. According to Wakīʿ, this is true for the caliphs al-Muʿtaṣim (r. 217-227/833-842), al-Wāthiq (r. 227-232/842-847), and the early reign of al-Mutawakkil (r. 232-246/847-861). Thus, chief justice Aḥmad b. Abī Dāw'ūd carried out inquiries targeting the beliefs of judges and of scholars regarding whether the Qur'ān was created or not.[1390] Wakīʿ contends that "the caliphs corrupted the schools of law in this period"[1391], a comment which could refer to either the misuse of legal interpretation by the state authorities or the caliphs restricting *qāḍis* to apply the doctrines of a specific school of law.[1392] As the caliph's delegate, the judges were not fully independent from the state. Though there are reports of judges opposing the caliph and his political aids, the usual situation was that the judge was loyal to the political powers that could remove him from office him at any time and with no reason. The *qāḍī* remained dependent on the state both for his appointment, and for the enforcement of the verdicts by the executive organ of the police (*shurtā*).

The vulnerability of the *qāḍī* was of economic nature. On a financial level, the delegation put the *qāḍīs* of Iraq in an unstable position, because they were subjected to the permanent risk of removal from office by the caliph. With the centralisation of appointments and the monthly salary attached to it, the judiciary became an increasingly profitable function. However, a removal meant the loss of a comfortable income. In such conditions of structural precariousness, the financial link which joined the *qāḍī* with the political power contributed to making of the *qāḍī* a civil servant dependent on political power. [1393]

On a geographical level, it is difficult to not see the judge in a triangle of centralized delegated authority as granted by the caliph and as a local figure that needed to adapt to the political settings as headed by the governors. Centralization of the judiciary must have had a particular effect in the provinces.

[1390] Wakīʿ, *Akhbār al-quḍāt*, III, p. 294; Masud, "The Study of Wakīʿ's" (2008), p. 121.
[1391] Wakīʿ, *Akhbār al-quḍāt*, III, p. 293; Masud, "The Study of Wakīʿ's" (2008), p.121.
[1392] Masud, "The Study of Wakīʿ's" (2008), p. 121.
[1393] Tillier, *Les Cadis* (2009), p. 274.

There, it is possible, that the judiciary acted or was perceived as the extension of the central government in Baghdad, the distant caliph – especially if they were not natives of the city they were appointed to, and did in fact come as outsiders to a legal community with its own established legal traditions. The judge was probably representing the state in its far out provinces, having to stick out his neck, instead of the caliph's, for the decisions and verdicts he took. Also, with a judge leaving the city after his tenure ended there, it was clear that the centralizing measure meant that the judge would then again leave the community he had entered as judge. The judge's allegiance or loyalty to the town that was not his own might have been regarded as limited.

Territorial distance from the center was probably particularly difficult and made the establishment of authority for the judge difficult, where central power was contested. Central power was, for example, severely affected during civil war or local turmoil. Towards the end of the Umayyad era, the collapse of central government had allowed local magnates to take over power, especially in Syria and Egypt.[1394] Caliph al-Ma'mūn took great efforts, wealth, diplomacy and force, to reassert control over the provinces and suppress internal rebellion.[1395]

In both provinces, the Abbasid caliphate was far from being a centralised, bureaucratic state, with the caliph as absolute ruler. The power of both the caliph and his governor was severely circumscribed by local forces, and successful government was the result of negotiation and comprise, as much as the exercise of authority.[1396] The authority of the judiciary is linked to the authority of the ruling: In politically turbulent times, the authority of the judiciary is reduced, in stable times, their authority increases.[1397]

[1394] Also, provinces at the fringes of the Empire presented the Abbasids with special problems of government, such as Khurasan to the northeast, see Kennedy, *The Early Abbasid Caliphate* (1981), p. 177-187, or or Ifriqiya (North Africa) to the West, Kennedy, *The Early Abbasid Caliphate* (1981), p. 187-195. It was natural that the establishment of the Abbasid regime would provoke opposition, for a variety of reasons, be it supporters of the previous Umayyad dynasty in Syria, people in Egypt and the Jazira who felt crushed by over-taxation and maladministration, or the most important faction were those who became rapidly disillusioned with the regime of the Abbasid caliphs, arguing that the Abbasids were not really members of the house of the Prophet and that only ʿAli b. Abi Ṭālib (who had married the Prophet's daughter) and his descendants could really be considered as legitimate rules and that the fight for a truly Islamic must therefore go on (followers called Alid), Kennedy, *The Early Abbasid Caliphate* (1981), p. 198.

[1394] Kennedy, *The Early Abbasid Caliphate* (1981), p. 164-174

[1395] Kennedy, *The Early Abbasid Caliphate* (1981), p. 164-174.

[1396] Kennedy, *The Early Abbasid Caliphate* (1981), p. 195.

[1397] Rehbinder*, Abhandlungen zur Rechtssoziologie* (1995), p. 64, on the authority of the judiciary (Rechtsstab): "In politisch unruhigen Zeiten wir die Autorität geringer, in politisch stabilen Verhältnissen wird die Autorität grösser sein."

Centralization also had a further effect on judges. Judges had to navigate the delicate balance of caliphal authority, delegated authority and their independent expert authority. The grip of the caliph turned some judges into assistants to the caliph, and even political instruments. After the reform of al-Manṣūr and the strengthening of caliphal centrality in the judicial adminstration, the *qāḍīs* of Iraq and the provinces became auxiliaries of the central power, charged with different tasks for the caliph. As such *qāḍīs* also were ordered by the caliph to buy a house for caliph, to handle caliph' s endowment (*waqf)* and to supervise restoration of the aquaducts and cisterns of Baghdad. [1398] But the mission which appears most often in sources is of another order: *qāḍīs* were regularly used as extension of the person of the caliph, either to inform him about the situation of empire or to legitimize political acts. [1399] The judge thus also acted as a political authority, engaged as judges in political trials and the court of complaints, especially where in some cases political expediency trumped the rule of law. [1400]

Thus, state centralization did not go unchallenged: At times, judges were confronted with local negative sentiment. It is reported that some judges had bodyguards. They surely protected judges from violent litigation parties who were not satisfied with the outcome of the verdict, but respect for the judge is surely also violated when the judge is considered to represent other interests, such as upholding the rule of the state.[1401]

According to *N. Tsafrir*, caliphal centralization policy had successfully transformed the judiciary: She argues that the *qāḍīs* of Iraq, from the second half of the second century A.H., were not any more the representatives of the local population – and the local legal community – but that they became exclusively those of the caliph. [1402] It is true that many judges were sent to the cities they had to adjudicate in, but, and especially when including the examples of Egpyt, possibly equally many judges were from among the local legal community, especially when the local jurists exercised their authority to impact on the choice of judges, as examples in Chapter Three showed. This speaks for a

[1398] See Tillier, *Les Cadis* (2009), p. 553.
[1399] Tillier, *Les Cadis* (2009), p. 553.
[1400] Tillier, *Les Cadis* (2009), p. 554-576.
[1401] On the *ḥajibs* (chamberlain) as part of the judicial hierarchy and staff of the judge see Chapter Four, I.3.c. Judge Ibn Ḥazm was assisted by a chamberlain who held a whip in his hand and judge Shurayḥ is reported to have had two chamberlains, Khaṣṣāf, *Adab al-qāḍī*, p. I, p. 145. Surty, "The Ethical Code", p. 158, and Al-Khaṣṣāf, *Adab al-qāḍī*, p. II, p. 222. Surty, "The Ethical Code", p. 158.
[1402] Tsafrir, *The History* (2004), p. 90.

strongly persuasive authority of local jurisconsults over the caliph, strong enough to topple central power, to affect the judiciary. Certainly, to appoint or remove judges according to the local jurisconsults wishes in many cases also served the caliph. Following the jurisconsults' advice he must have hoped to have a higher chance of stability and legitimacy of his rule through a judiciary that was approved of by the jurisconsults. Though the Abbasid caliphs with their ruling elites succeeded in turning the structuring of the judiciary into a pillar of centralization and thereby made the *qāḍīs* instruments of caliphal policy, as well as representatives of the highest authority of the Empire. The will of the local legal community of jurists[1403] continued to have weight and persuasion within the recruitment procedure for several decades, at least until the beginning of the third century A.H. (afterwards *qāḍī* became an honorary title, and it can be assumed that judges were continued to be appointed from among the local school and the local jurists). But even then, *qāḍīs* from Basra and Kufa, for example, who continued to be appointed from among the local jurists, still represented the local legal community which had them pre-selected and proposed to central power.[1404]

The role of the local jurisconsults should thus not be underestimated in disturbing the judicial centralization policies of the Abbasids. It is not that the caliphs succeeded in a total and exclusive control over the judiciary, and through them on the making of legal norms and their application. [1405] The caliphs were free to impose their judiciary at the seat of power, the city of Baghdad, which was also still a young city and open to more experiments than the rest of Iraq.[1406] On the other hand, in the Iraqi provinces (*amṣār*) of the South especially in Basra and Kufa, the authority and influence of the legal scholars had for a long time prevented the Abbasids to change without risk the criteria of the recruitment of *qāḍīs*.[1407] Centralization, so *M. Tillier*, was contained to a centralisation which weakened the local governors, but that beyond this remained above all symbolic. Neither caliph al-Mansūr nor his successors had dared to take on legal scholars by putting forward the candidates of their choice, and instead sought their consultation and allowed them access to the caliphal court. It was only in the last third part of the

[1403] Tillier, also seeing the need to qualify Tsafrir's findings of judges being solely central state functionaries, speaks more generally of the will of the "local people" that countered a fully successful centralization policy. Tillier, *Les Cadis* (2009), p. 222.
[1404] Tillier, *Les Cadis* (2009), p. 222.
[1405] Tillier, *Les Cadis* (2009), p. 273.
[1406] Tillier, *Les Cadis* (2009), p. 273.
[1407] On local jurisconsults affecting the choice of the judiciary, see Chapter Three, I.2.

third/ninth century that a new reform came to reorganise the distribution of the Iraqi jurisdictions, while *qāḍīs*- or at least *qāḍīs* by title became the exclusive representatives of central power. [1408]

Centralization was challenged by local jurists, and had to be negotiated with them. Despite the fact that appointments and removals remained in the hands of the caliphs, the jurisconsults exercised their local impact. They nominated judicial candidates that suited their legal rationale, they rallied against a judge they wanted to be removed from office, and they came in person to complain about the judge, whether as a delegation, as collective authority, or as single jurists and scholars- in many cases, the caliph ceded to the jurisconsults' persuasive authority, at least by receiving them and allowing them access to him personally. Though the caliph did not follow their opinion in all cases, the fact that all actors involved, the caliph, judge and jurisconsults, were aware of the jurisconsults' access to and persuasive authority over caliph, made everyone reckon with their authority.

Even if the caliph attempted to have a determined, centralized hold on the judiciary, with the intention to standardize, if not legally unify the provinces[1409], they chose nevertheless to take into consideration the authority of local legal scholars with their local legal traditions.

d. Conclusion: The Judge as Delegated Authority and Independent Expert Authority

Judges had to navigate the delicate balance of caliphal authority, delegated authority and their independent expert authority. The judge was part of the caliphal state, and assigned to partake in the legal and religious authority of the caliph. The judge was put under the immediate hierarchic authority of the caliph and became a direct representative of the caliph in the middle of the city. At the same time, judges were eager to retain their independence from the caliph to be able to dispense justice, and were advised by the contemporary literature to not blindly follow the caliph as a higher authority, and instead serve justice.

[1408] Tillier, *Les Cadis* (2009), p. 274.
[1409] Tillier, *Les Cadis* (2009), p. 185.

2. Towards a State- Driven Professionalization of the Judiciary

Caliphal efforts to centralize the judicial administration were not the only changes that the judiciary underwent. Centralizing efforts by Abbasid caliphs to re-organize judicial administration were accompanied by gradual but distinct changes in the composition of the professional system of the judiciary. Following *Max Weber*, law as an order needs to be professionally guaranteed and secured through the judiciary and its legal staff, so that rules are kept and violations of these rules sanctioned.[1410] In this sense, law gradually was to turn into a professionally sanctioned factor of order.[1411] Making Abbasid judicial policy key for their legitimacy, the law was required to be professionally guaranteed, implemented and sanctioned. It is in this sense that professionalization as an instrument of reform is discussed– both as a state-driven policy, i.e. a caliphal drive to foster professionalization, and as an autonomous developmet of legal personae involved in crafting the profession of the judiciary.

In this study, professionalization is considered as an organizational process that enhances, or even creates, authority. Following the analysis of professionalization by European legal historian *H. Siegrist*, with professionalization often comes a power shift in the system of social domination and work distribution by which the skilled professional can or will rise above others.[1412] Differently put, professionalization raises the authority over others, creating a hierachy of who determines the substance of the professionalized field, here the field of law.

Additional gains of professionality, due to the technical, expert superiority, are usually a higher social status and greater independence. Professionality usually leads to the expectation that the professional performance is competent, follows no own interests and fulfills the professional function according to professional rules. Non-professionals are no longer allowed to perform the same activities, and a hegemonic profession makes other professions submit to it. Such professionalization processes are linked to conflicts with hierarchy, segregation and distinction, and a drive for establishing a monopoly.

[1410] According to *Max Weber an order is law*, „wenn sie äußerlich garantiert ist durch die Chance (physischen oder psychischen) Zwanges durch ein auf Erzwingung der Innehaltung oder Ahndung der Verletzung gerichtetes Handeln eines eigens darauf eingestellten Stabes von Menschen.“ Weber, *Wirtschaft und Gesellschaft* (1980), p. 17.

[1411] On law as a professionally sanctioned order of law, see Baer, *Rechtssoziologie* (2011), p. 120.

[1412] Siegrist, *Advokat, Bürger und Staat* (1996), p. 14, whom I largely follow on the following definition of professionalization.

Significantly, professionalization is considered to lead to specific processes of subordination and superiority (not only between the professional and the lay-person and amateur, but also between different professions of the same field) and to a functional and occupational segmentation; interests of other parties in the professional career are declared illegitimate. These professionalization processes are always associated with changes in the system of knowledge and social stratification, power and influence.[1413]

The sociological concept of "profession" together with "professionalization" has the advantage that it is theoretically well developed, analyzed and empirically well founded – with regard to the Western European continent and the USA.[1414]
How does a modern and abstract socio (-legal) concept such as that of profession relate to historical terms?[1415] Following *H. Siegrist*, I would argue that professionalization theories can not only be applied to the European legal history of legal profession but also to the Islamic experience of professionalization.[1416] While there is much debate within the Anglo-Saxon literature about the characteristics of a "profession", there is also a

[1413] Siegrist, *Advokat, Bürger und Staat* (1996), p. 13-14. On the relation between knowledge, power and rule in the history of professions see also for example Goldstein, *Console and Classify* (1984) whose work on professionalization is based on Foucault, and ibid, "Foucault among the sociologists: the "disciplines" and the history of the professions" (1984), p. 170-192.
[1414] Two hundred years of extensive period of research on the European continent on the emergence and development of the legal profession, oriented towards concepts that were originally created for the academically trained civil servants, or the academic free profession (freie Berufe, professions libérales, professioni liberali), particularly lawyers, both having a long European tradition and were further developed in the liberal time of the 19th century. The study of these professions thus focuses on their development a) in the autonomy from the state and b) through the prestige they have enjoyed by their society and its expectations. Not only that this study is concerned first with the professionalization of judges, and later with that of jurisconsults, also lawyers did not exist in Islamic law. Siegrist, *Advokat, Bürger und Staat* (1996), p. 17. Not only that this study is concerned first with the professionalization of judges, and later with that of jurisconsults, also lawyers did not exist in Islamic law. However, there is also literature on the history and sociology of the judiciary, though they make little to no use of professionalization theories.
[1415] Herein lies a great contribution of Hannes Siegrist' seminal work, addressing the tensions between conceptional and historical terms and reconciling socio-legal and historical understandings of the history of European legal professions, Siegrist, *Advokat, Bürger und Staat* (1996) particularly p. 18. Siegrist provided a rich intertemporal, international and intercultural comparative study on legal professions in three European countries at different historical times.
[1416] One challenge of employing the literature on professionalization theories lays in the much voiced assumption that professionalization is a prerequisite and a consequence of the large Western modernization process, i.e. as part of a comprehensive development process, characterized through rationalization, systematization, scientific transformation, differentiation and specialization. The field of comparative professionalization research is thus a contribution to the modernization problem by discussing the history of a profession based on general European trends and national and regional variations of modernization. The problem thus is that professionalization is considered as a modernization that reflects its own European search for self. See, for example, Parsons who speaks of professionalization as "Western" theories of "modern societies" of the 20th century, heavily engaged with and against the "Judeao-Christian world", Parsons, "Professions" (1986), pp. 536-537. The task here lies in employing professionalization theories, while keeping attentive that they had been developed with the European continent (and later developments in the USA) in mind, as part of a larger project of reconstructed continental modernity.

debate about their applicability for other societies.[1417] Similarly, it is valid to debate the adaptability for early Muslim societies. Sociologist *Talcott Parsons* sees the end of this time line in "the full professionalization"[1418], an increasing differentiation and specialization of the profession. This is particularly relevant and problematic, since for *Parsons*, professionalization and autonomy are significantly related to a process of secularization. By referring to European legal history, he constates that "all 'learned men' were in some sense religious specialists", i.e. they were professionalized, yet not "fully" autonomous from "the religious matrix".[1419] The autonomy of the secular intellectual disciplines, so *Parsons*, crystallized in the Renaissance, yet anything like the full professionalization of competence in them took some time and required the development of a variety of conditions. [1420]

Yet, the focus on professionalization as a process–instead of professionalism or profession, a distinguishing term of semi-professions[1421], quasi-professions, or proto-professions vis-à-vis "full professions" –implies that some criteria of professionalization might be more strongly present than others. As might be rightly assumed, we do not find an autonomy from "the religious matrix" in the early formative period of Islamic law, i.e. at a time when Islamic law was about to establish itself as a system of legal thought. This does not mean, though, that there were no distinctions possible between Islam as law and Islam as theology, or that secular considerations, in the sense of non-religious aspects, did not play a role in organizing the judiciary, and assigning it with authority.[1422]

Until now, many have thought that professionalization needed to differentiate itself from the historical matrix of religion[1423], but now we should think that the strive to Islamicize the judicial occupation has majorly contributed to a professionalization of the judiciary in the formative period of Islamic legal history.

[1417] See for example the question of adaptability for the Germany society, Hesse, *Berufe im Wandel* (1972).
[1418] Parsons, "Professions" (1986), p. 537.
[1419] Parsons, "Professions" (1986), p. 537.
[1420] Parsons, "Professions" (1986), p. 537.
[1421] Semi-professions were prominently dealt with in particular by Etzioni, Amitai (ed.), *The Semi-Professions and Their Organization* (1969), focusing on elementary school teaching, nurse and social work.
[1422] On Islam as a religion in a legal system see Chapter One, I.
[1423] Parsons, "Professions" (1968), p. 537 ; Luhmann, *Ausdifferenzierung des Rechts* (1981), pp. 35-52.

"Professions" as an occupational category and "professionalization" as a process hereof is analyzed and discussed as structural attributes of a "dynamic quality".[1424] This dynamic is underlined by employing the term "towards" in the heading of this section. This way it is not about assessing whether the occupation is a profession or whether it fits into particular categories of profession, but about capturing which occupations are in the process of "professionalization", assessing on which end of professionalization line they stand, i.e. rather on the beginning or end of this line.[1425] Also, the development of a professionalized, expert occupation or a functional elite ("Funktionselite")[1426] as exemplified for jurists, the criteria developed can have a different weight.[1427]

Following legal historian *Siegrist*, I use an *Idealtypus* of profession.[1428] An ideal type is not to be found in its 'pure' form in reality, but rather a synthesis of all characteristics and elements, creating context.[1429] An ideal-typical analysis has the advantage of permitting the possibility of wide empirical variation.[1430] As now divergent professionalization models and theories have emerged, it is important to attempt to put forth the most significant criteria and suggest what an ideal-type profession might look like. The choice should not disregard the fact that professionalization theories come with time-bound, normative, and ideological implications. The (inter-)disciplinary difficulties of applying a modern sociology of professionalization to intellectual and legal histories remain nevertheless daunting.[1431]

[1424] On dynamic qualities in professions, see Millerson, *The Qualifying Associations* (1964), p. 9. For a distinction between the terms profession, professionalization and professionalism, see Vollmer/Mills (eds.) *Professionalization* (1966), pp. vii-viii.

[1425] With further references for the Anglo-Saxon literature, see Hesse, *Berufe im Wandel*, p. 45, footnote 26. On the necessary flexibility and controversy around single characteristics of profession, see Hesse, *Berufe im Wandel* (1972), pp. 45-46.

[1426] Dilcher, "Der deutsche Juristenstand" (1997) p. 166.

[1427] See Dilcher, "Der deutsche Juristenstand" (1997), p. 165.

[1428] Siegrist, *Advokat, Bürger und Staat* (1996), p. 18.

[1429] Weber, *Wirtschaft und Gesellschaft* (1980), pp. 3, 4, 10; Raiser, *Grundlagen der Rechtssoziologie* (2009), p. 94; Baer, *Rechtssoziologie* (2011), p. 119. Critiquing the concept of "logical[ly] formal rationality" behind the "Idealtyp", Kennedy considers the ideal type today as problematic rather than offering a powerful description, Kennedy, "Legal Formalism" (2001), p. 8637

[1430] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 959.

[1431] On the interdisciplinary challenges of addressing sociological modells and concepts for the legal profession and their effect on the theory of law, Maiwald, *Die Herstellung von Recht: eine exemplarische Untersuchung zur Professionalisierungsgeschichte der Rechtsprechung* (1997), pp. 9-10, and in detail pp. 11-57.

Though the Muslim judiciary has at times been discussed as professionalized[1432], Muslim judicial careers have not yet been systematically studied through the lenses of theories of professionalization.[1433] From this perspective, several questions arise: How is professionalization related to the centralization of the state, affecting the delicate balance of control and autonomy of the judge? What does professionalization as a form of organization indicate about authority? Is the degree of professionalization a dimension related to the degree of authority? Did professionalization lead to processes of subordination and superiority between judge and jurisconsult? Did a functional and occupational segmentation emerge that allowed the interests of other parties in the professional career to be declared illegitimate? And if not, if a clear segregation of professional fields of judge and jurisconsult cannot be established, does that mean that the respective occupations cannot be declared professionalized? To answer these questions, professionalization is examined first with respect to the Abbasid Muslim judiciary, and later regarding the community of Muslim legal scholars.

There is anything but unanimity on the number of criteria needed to assess professionalization. For example, *H.A. Hesse* considers two criteria as constitutive for attesting professionalization: differentiation and the autonomy of opportunities to act.[1434]

T. Parsons also concedes that similar to many categories of social status, the boundaries of the group system called the professions are fluid and indistinct.[1435] However, he considers three critera to be "core criteria" for the "occupational role". [1436] First is the requirement of formal technical training together with an institutionalized way of

[1432] Hallaq, *The Origins* (2005) p. 97-98, Tillier, *Les Cadis* (2009), pp. 269, 357-361.
[1433] Regarding the use of professionalization theories, it should be mentioned that most of the US-American and European professionalization theories, coinciding witht he emergence of capitalist industrialism, evolve around the profession of lawyers. However, advocacy and the significant role in developing the law by professional lawyers on behalf of clients, common in Europe and the United States, is unknown to Islamic courts. At various points, we find the practice of a litigant appointing a wakīl, a representative, to plead on her or his behalf – an option sometimes used by women and girls who had to or preferred to keep a low public profile at court, see Tillier, "Women before the Qāḍī" (2009), p. 15. The role of these legal representatives was not one of interpretative authority, and there seems no evidence that the representatives influenced the development of Islamic law.
[1434] Hesse, *Berufe im Wandel* (1972), p. 125, pp. 70-71, stressing the flexibility of possible further criteria, pp. 64-66. Hesse explains that criteria developed very much at the height of the debates over professions , between 1900-1920, and 1950-1975, and criteria where every time linked to social reform interests, wanting to push forward with the recognition of certain occupation groups, Hesse, *Berufe im Wandel* (1972) p. 51.
[1435] Parsons, "Professions" (1968), p. 536.
[1436] Parsons, "Professions" (1968), p. 536.

certifying the adequacy of the training and the competence of trained individuals. The training must include an "intellectual component" and give primacy to a "cognitive rationality". The second criterion is that not only must the intellectual field be mastered and understood, but practical skills for its usage must be developed. Thirdly, a full-fledged tradition must have some institutional means of making sure that such competence is put to socially responsible uses.[1437] For *T. Parsons* the most obvious uses are in the sphere of practical affairs, such as the application of medical science to the cure of disease[1438], or, as we might say the application of law to the termination of disputes.

Historian of European law *F. Ranieri* considers five indicators necessary to characterize the profession (in a modern society, he adds): specific and differentiated professional competences, a particular ideal of the profession, the freedom in disciplining the professional practice, and the autonomy vis-a-vis the own clientel.[1439] *F. Ranieri* thus adds and stresses the freedom to discipline violations of professional rules by the members of the profession and the exercise of autonomy against the non-professionalized.

It is European legal historian *G. Dilcher*'s definition that extends to six criteria, showing the widest range of criteria for professionalization. They encompass (1) specialised educational training, (2) establishing qualifications, (3) monopoly of occupation, (4) full time occupation providing for the main source of income, (5) professional norms of conduct and (6) professional autonomy.[1440] In opting for *Dilcher*'s choice of criteria in this study, it is hoped that the full (and strictest) range of possible criteria can be discussed, and that the information entailed in the primary sources can speak for itself as much as possible.

Whether these criteria, in their respective weight, are adaptable to the dynamic development of the Abbasid judiciary, and how their condition of professionalization shapes their authority, shall be the leading questions for the coming section.

[1437] Hesse debates the necessity of an altruistic purpose and considers this criterion not as constitutive, *Berufe im Wandel* (1972), p. 52.
[1438] Parsons, "Professions" (1968), p. 536.
[1439] Ranieri, "Vom Stand zum Beruf" (1985), p. 89.
[1440] Dilcher, "Der deutsche Juristenstand" (1997), p. 165.

a. Specialization of Tasks: Developing Professional Competences

All professionalization theories underline that a profession needs to be specialized and differentiated so that it sets itself apart from other professions. Professionalization is the process by which an occupation undergoes transformation to become a profession.[1441]
In the early days of Islamic legal history, such a specialization was not to be found. The judgeship position concurred with other administrative posts, be it the chief of police, the master of treasurey or the governor. Prior to Abbasid centralization efforts, the post of the judge and of the governor and tax-collector often coincided.[1442] Especially when appointed to other cities than the capital Medina, where first the Prophet and then the four righteous caliphs took up adjudication, the *qādīs* performed adjudication together with other functions as representatives of the center.[1443]
Under the Umayyads, adjudication, policing and tax collecting were often jointly taken up by the judge, and specialization only came gradually. Competences of Umayyad *qāḍi* ʿĀbis b. Saʿid for instance were both adjudication and police (*qāḍā' wa shurṭa*).[1444] Under the Abbasids policing was not be found as duty of judges anymore. Also the occupation of story-telling (*qāṣṣ*; pl. *quṣṣāṣ*) was practiced by many *qāḍīs*. This function usually entailed recounting stories of a generally educational nature, related to the Qur'ānic narratives of ancient peoples and their fates, biblical characters and, more signficantly, the exemplary life of the Prophet.[1445]

Of particular interest for this study is that an early overlap seems to have occurred also between the occupations of *qāḍī* and *muftī*. [1446] The early institution of *qāḍī* was a combination of the arbiter (*ḥakam)* and the expert in Islamic law (*muftī*).[1447] Similarly, Wakīʿ states in one passage that in the early days of Islam a qāḍī functioned as an expert

[1441] Millerson, *The Qualifying Associations* (1964), p. 10; Hesse, *Berufe im Wandel* (1972), p. 34.
[1442] On the fusion of judicial and executive (administrative, policing and fiscal) functions prior to Abbasid rule, see Hallaq, Origins (2005), pp. 36-39; Bligh-Abramski "The Judiciary as a Governmental Tool" (1992), p. 44.
[1443] Masud, "The Study of Wakīʿ's" (2008), p. 120.
[1444] Kindī, *Kitāb al-Wulāh*, p. 311. Several Umayyad judges explicitly had the comptence of adjudication and police.
[1445] Hallaq, *The Origins* (2005), p. 39. On judges as story-tellers, see Hallaq, *The Origins* (2005) pp. 39-40; Bligh-Abramski, "The Judiciary" (1992), p. 47.
[1446] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 80.
[1447] On the origins of the *qāḍī*, and the development from ad hoc arbitrators (*ḥakam*) to "proto-qāḍīs", i.e. from a system of arbitration to a judicial system, see Hallaq, *Origins* (2005), p. 35-36; Tillier, *Les Cadis* (2009), pp. 74-75.

on law (*muftī*).[1448] It is not quite clear at which point these functions separated, as the following narrative shows:

Long before the Abbasids, second caliph ʿUmar (r. 12- 23/634-644) has send ʿAbd Allāh b. Masʿūd as *qāḍī* to the Iraqi city of Kufa with the followig words: "I send you as a teacher (*muʿallim*), without whip or stick, content yourself to the Book of God, because it will suffice you and them." [1449] Does this mean that Ibn Masʿūd had no coercive power? Probably not, because the people of Kufa complained to the caliph about a punishment the qāḍī had inflicted on a man, and when caliph ʿUmar asked the judge for explanations, he congratulate the judge on his act. ʿAbd Allah b. Masūd was perhaps not formally appointed to adjudication, at least he does not appear in the list of biographies in Kufa by Khalifa b. Ḥayyāṭ[1450]: Could this suggest that he was primarily responsible for educating the population?[1451]

Tillier concedes that the status of the decision made by these "proto-*qāḍīs*" is not very clear. Wakīʿ continues to remain unspecific when he speaks of Abū l-Aswad al-Du'alī, *qāḍī* of Basra under fourth caliph ʿAlī: "At that time, the *qāḍī* was called 'the *muftī'* "[1452] Did the early *qāḍīs* play a rather educational role, introducing the population to the new laws of Islam? Did they even carry the title of *qāḍī*?

The sources on the earliest relationship between, or rather overlap of, *qāḍī* and *muftī* leave open many questions. [1453] It can be solidly assumed, though that whatever kind of initial overlap there existed, it gradually developed into a differentiation between *qāḍī* and *muftī*.

A first differentiation occurred when, during the Umayyad caliphate when the office of *qāḍī* was defined as a deputy of the caliph and governor, the religious authority and the legal qualifications of *qāḍīṣ* became debatable among the jurists. [1454] *Muftīs* began functioning as private experts in law, and their *fatwas* became an institution alternate to the *qāḍī* court during the formative period of Islamic law. [1455] A lay-person could thus choose whether to seek legal recourse at a *qāḍī* court (where the *qāḍī* could bring about a

[1448] Wakīʿ, *Akhbār al-quḍāt*, I, p. 288; Masud, "The Study of Wakīʿ's" (2008), p. 120.
[1449] Wakīʿ, *Akhbār al-quḍāṭ*, II, p. 188.
[1450] Khalifa b. Ḥayyāṭ, *Ta'rīkh*, p. 88. Tillier, *Les Cadis* (2009), p. 75.
[1451] Tillier, *Les Cadis* (2009), p. 75.
[1452] Wakīʿ, *Akhbār al-quḍāt*, I, p. 288, *al-qāḍī yawma'idhin yud'ā al-muftī.*
[1453] See also Tillier, *Les Cadis* (2009), p. 74-75.
[1454] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 80.
[1455] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 80.

final termination of the litigation with other parties), or to a *muftī* where the legal opinion could bring a legal, yet non-binding resolution, if no other party was involved (in a unilateral legal act) or if all parties agreed to follow the opinion.

The expansion and increasing complexity of state functions appear to have necessitated a reduction and specification of the tasks assigned to the judge.[1456] Gradually, the judge developed from the "jacks-of-all-trades" [1457] to a professional figure. By the beginning of the third/ninth century, around fifty years after the Abbasids took over rule, *qādīs* became exclusively concerned with the judicial business.[1458] In fact, what is exclusively judicial business varies from one legal tradition to another. All legal traditions have in common the judicial task to terminate legal disputes, i.e. litigation tasks. But in addition, judges are charged with many non-litigious tasks as well, and in some cases also representative tasks (aa on the diverse tasks of the judiciary). It will also be seen how their profession specialized with respect to other legal-judicial professions (bb).

aa. Tasks of the Judiciary

Authority is related, amongst other things, to the tasks assigned to the persona. This becomes especially clear through the main task of the judge determinating legal disputes, giving the judiciary the final say over questions that involve life, property, family and fate. But also further tasks of the Abbasid judiciary, comprising non-litigation and representative and religious tasks, signal different aspects of their authority.

(1) Litigation Tasks

As mentioned before, as a general rule the jurisdiction of the *qāḍī* court was that of what we today would call private law- family law, inheritance, civil transactions and injuries, and endowments.[1459] The judicial chronicles by Wakīʿ and al-Kindī show a strong concern for legal cases on commercial matters. Altogether, their books contain about 215 reports dealing with commercial claims or debts.[1460] The authority to terminate legal disputes, especially if related to disputes over capital and property is not only a particular

[1456] Hallaq, *Origins* (2005), p. 57.
[1457] Coulson, *A History of Islamic Law* (1964), p. 29. Coulson sees the first traces of a professional pride appearing and refers to Al-Kindī on the judiciary of Egypt at the end of Umayyad rule.
[1458] Hallaq, *Origins* (2005), p. 98; Coulson, *A History of Islamic Law* (1964), p. 29.
[1459] Coulson, *A History of Islamic Law* (1964), p. 132. See also Khaṣṣāf's *adab al-qāḍī* work covering mostly "private" law questions of law, Chapter Two, IV. 2., and Chapter Three, II. 5.
[1460] Tillier, "Women before the Abbasid Qadi" (2009), p. 294.

delicate issue.[1461] It also is one that enhances authority since private property is sacred to the law and its protection considered of legal and religious importance.[1462]

(2) Non-Litigation Tasks

Next to terminating litigation, the judiciary knew a variety of further tasks. [1463]

Khaṣṣāf in his *adab al-qāḍī* works has mentioned four non-litigation functions of the *qāḍī* (*amanāt al-ḥukm*, literally: trustee positions within adjudication). The *qāḍī* is to administer and supervise the endowments (*awqāf*)[1464], offer guardianship for orphans, caring for their wellbeing and administering their financial affairs, their property and estates[1465], offer guardianship for the properties of absentees and those who died heirless[1466], and prisoners' affairs.[1467]

Administering and supervising the charitable endowments, their material conditions and maintenance as well as the personnel managing them, served both the public as well as the needy. For Egypt, Tawba ibn Namir (in office 115-120/733-738) is considered the first judge to have made the supervision of endowments a judge's task.[1468] In 736 C.E., he instituted a register of *waqfs*, charitable endowments. Before this, such properties had been under the exclusive control of private administrators or the beneficiaries.[1469] Because the endowment was for the benefit of the poor and needy, he thought that he should take charge of *waqfs* to protect their interests. Such initiative added to enhance the importance and the authority of the *qadi's* office. Tasks like these helped to have the judge gradually acquiring the prestige of an elevated rank in the hierarchy of public servants. [1470]

[1461] On sharp disputes between judges and jurisconsults on cases of property, see Chapter Three, I.2.a.bb (judge Khālid), kk. (judicial candidate Ibn Shayba), I. 2.b.aa. (judge Ismaʿīl), bb. (judge al-Kindī), I.3.c.(judge al-Mufaḍḍal); I. 4. b. (judge al-Harīth); II. 4. What about:Legal Theme- Property.
[1462] Hallaq, *Origins* (2005), p. 146.
[1463] Schneider, *Das Bild des Richters* (1990) p. 112-113. Bligh-Abramski, "The Judiciary as a Governmental Tool" (1992), p. 182-188.
[1464] Kindī, *Kitāb al-Wulāh*, pp. 383, 387, 424, 444, 450.
[1465] Wakīʿ, *Akhbār al-quḍāt*, II, p. 58; Kindī, *Kitāb al-Wulāh*, p. 444; Khaṣṣāf, *Adab al-qāḍi*, sec. 70, pp. 76-77.
[1466] Wakīʿ, *Akhbār al-quḍāt*, II, p. 58; Kindī, *Kitāb al-Wulāh*, p. 444; Khaṣṣāf, *Adab al-qāḍi*, sec. 70, p. 77.
[1467] See Khaṣṣāf, *Adab al-qāḍi*, I chapter 6, Surty, "The Ethical Code", p. 155.
[1468] Kindī, *Kitāb al-Wulāh*, p. 346; see also Kindī, *Kitāb al-Wulāh*, p. 390, 419; Wakīʿ, *Akhbār al-quḍāt*, II, p. 58. For Iraq, judge Sawwār is recorded to have included endowments into his job. Wakī, *Akhbār al-quḍāt*, II, p. 125. Sawwār was judge in Baṣra, appointed in 138/ 775 or 140/777, see Wakīʿ, *Akhbār al-quḍāt*, II, p. 56.
[1469] Coulson, *A History of Islamic Law* (1964), p. 33; Schneider, *Das Bild des Richters* (1990), p. 122.
[1470] Coulson, *A History of Islamic Law* (1964), p. 33.

The non-litigation task of guarding the interests of the orphans has a religious anchoring, with the Qur'ān requiring Muslims to protect the orphans, their wellbeing and property, as a particularly vulnerable group that deserves the care of the Muslim community. With turning this religious duty into a judicial duty, the judge added a religiously acknowledged duty to his jurisdiction, and thereby generated a religious authority. By the judge attaching himself to the interests of the orphans, he became a social, moral and religious authority as well. Legal theory gradually developed into considering this responsibility to be among the standard duties of a *qāḍī*.[1471]

The task to protect the wellbeing of the needy enhanced the *qāḍī's* office. And this task was gradually extended to the mentally diseased, but also unmarried girls and women who sought guardianship in legal transactions.[1472] Additionally, since the property of orphans and heirless deceased was kept in the public treasury (*bayt al-māl*) of each province, the *qāḍī* as guardian and administrator of this property had access to the treasury.[1473] In several cases, he became de facto administrator of the treasury.[1474] To deal with the sensitive subject of finances also increased the *qāḍī's* authority. However, the trusteeship position over finances not their own, possibly also served as an unlawful occasion for some judges to enrich themselves, or at least be accused of doing so.[1475] Accounts or accusations of unlawful enrichment surely was a theme starkly diminishing the authority of the judges, appealing to the already circulating sujet of moral and financial corruption of the judiciary.[1476]

The judge functioned also as a trustee for the property of absentees.[1477] By protecting the interests of absentees as a group of people in need, the judge's non-litigation task is, again, linked to a honourable duty that increased his authority.

[1471] Bligh-Abramski, "The Judiciary as a Governmental Tool" (1992), p. 49.
[1472] On the *qāḍī's* guardianship over the mentally diseased and unmarried girls and women, see Schneider, *Das Bild des Richters* (1990), p. 119.
[1473] Kindī, *Kitāb al-Wulāh*, p. 355, 390. Al-Kindī mentions the establishment of a special treasury for the orpans in 194/810, Kindī, *Kitāb al-Wulāh*, p. 405.
[1474] Kindī, *Kitāb al-Wulāh*, p. 405, 451, 470; Bligh-Abramski, "The Judiciary as a Governmental Tool" (1992), p. 58-59.
[1475] Schneider, *Das Bild des Richters* (1990), p. 121. See the example of judge Masrūq al-Kindī in Egypt who was mistaken for haven stolen the money of the orphans from the public treasury, Chapter Three, I.2.b.bb.
[1476] On the anxiety over of all forms of possible corruption and injustices inherent in the position of the judge, see Chapter Two, IV (burden of adjudication). See also Johansen, "La corruption : un délit contre l'ordre social " (2002), pp. 1561-89.
[1477] Kindī, *Kitāb al-Wulāh*, p. 509.

The judge acted also as a trustee in prisoners' affairs. Khaṣṣāf insisted that the judge keeps a list of all inmates. When the judge decides to imprison a convict, especially for an unpaid debt, " the judge ought to write in his archive (*diwān*) that he has imprisoned him: 'The son of so and so was imprisoned for the son of so and so, whom he owes so and so many dirhams, at what day of what month and what year.' "[1478] The judge can have the arrest ordered for those not paying their debts, and those disturbing court sessions can also be arrested. [1479] The judge is to examine the situation of the persons in custody, question the inmates about their situation and then to decide about their release or their further detention. Khaṣṣāf highlights the formalities for inquiring on the situation of the inmates and the questions the judge needs to pose to them.

Non-litigious tasks largely helped to boost the judge as a trustworthy and independent professional and authority, orientated towards the well-being of all members of the community.

(3) Representative Tasks of the Judiciary: State Authority and Religious Authority

Judges also took on the task to lead Friday prayers and prayers at funerals[1480], and announced the rising of the moon, signaling the beginning or end of the fast of Ramadan.[1481] These activities combined religious, community, social and state functions. Religiously speaking, prayers and the attendance religiously symbolic occasions such the sighting of the moon increased the promotion of Islamic and, particularly, Qur'ānic values as the basis of communal life, for not only were these values the distinctive features of the new enterprise, the Abbasid caliphate, they were also essential to its continued success.[1482] This was even more the case, as most judges had backgrounds as scholars versed in the authoritative sources of Islam, who could act as guarantors of Islamic norms.

[1478] Khaṣṣāf, *Adab al-qāḍī*, sec. 281, p. 254. Tillier, "Prisons et autorités urbaines", (2008), p. 391. For further information on the system of prisons, Schneider, *Das Bild des Richters*, (1990), pp. 117-120, Schneider, "Imprisonment in Pre-classical and Classical Islamic Law", (1995), pp. 157-173.

[1479] Wakī', *Akhbār al-quḍāt*, II, p. 43, 69, 178; III, p. 171. On the rules of inmprisonment, explicitly for debts not paid, see Khaṣṣāf *Adab al-qāḍī*, sec. 279-305, pp. 253-271. On the administration of prisons by judges, see Tillier, "Prisons et autorités urbaines" (2008), pp. 390-392, and on the judge's obligations vis-à-vis the prisoners, pp.392-397

[1480] Kindī, *Kitāb al-Wulāh*, p. 509.

[1481] Hallaq, *Origin*s (2005), p. 98-99.

[1482] Hallaq, *Origins* (2005), p. 31.

The sources remain unclear about whether the judges were officially assigned this task or did so as an honorary obligation as the elite of the city. Judge Bakkār (d. 270/883) in Egypt was asked by governor Ibn Tulūn to lead the funeral prayer. [1483]

Surely, if the judge was delegate of the caliph, the judge represents the caliph in (not only) judicial affairs, but could also represent him in other affairs that fall within state-religious understanding of the caliphate. If the caliph was a deputy of the Muslim community, so was his judge, as evidence also by the sometimes used title *qāḍī al-muslimīn,* judge of the Muslims.[1484]

It cannot be disregarded that the judge was thereby also directly, or indirectly, fulfilling the function of standardizing or unifying an understanding of Islam as it served the caliphate.

The *qāḍī* had both legal and religious authority, representing the needs of the Empire: to be seen as a just and legitimate dynasty, leading the community to an Islamic understanding of justice. Linked to religion and to law, the figure of the *qāḍī* with its specific type of authority could be seen as an essential instrument of legitimization and of propaganda.[1485]

A further task, serving to affect the judge's authority, both augmenting and diminishing, falls into the sphere of religion, state representation and law: Judges were occasionally asked by political authorites to issue legal opinions. The judges needed to serve as a legitimazing entity for political decisions, before, and after political authorities took their decision. Amongst these questions posed to judges belonged such politically sensitive ones as determining the succession of the descendants of the ruling house at the expense of other descendants[1486], or the question on lawfulness of the killing of revolting population. Caliph Harūn al-Rashīd requested several legal opinions on this question, and renowned jurist Shaybānī issued a *fatwā* against the killing of the revolting population in Khurasan, while judge Abū al-Baj´khtaryi Wahb b. Wahb declared lawful the blood of the revolting.[1487]

This way, judges came to be seen as justifying and legitimizing some of the (unpopular) deeds of the political authorities. The effect on their authority can easily be guessed. At

[1483] Kindī, *Kitāb al-Wulāh*, p. 509.
[1484] On the title *qāḍī al-muslimīn*, reflecting the communal burden of adjudication see Chapter Two, IV.
[1485] Tillier, *Les Cadis* (2009), p. 543.
[1486] On caliphs requesting legal advice from judges and jurisconsults, see Chapter Two, III.1.
[1487] Ṭabarī, *Tar'īkh al-rusul*, IV, p. 631.

the beginning of Abbasid rule, requesting judges to issue fatwas came out of the insecurity felt by political powers vis-a-vis the law, and vis-a-vis what was politically legitimate to do. Later, around the fourth and fifth century, a *qāḍī* became less free to issue the legal opinion, opposing the new emerging powers, wazirs, and grand wazirs (ministers and grand ministers). Their fatwas were requested only to legitimize what the political powers had already decided on. [1488]

To conclude, the tasks of litigation and non-litigation generally enhanced the judge's authority, especially since they were core to the positive values of dispensing justice, protecting the vulnerable, poor and needy, and functioning as trustee over the finances and property of those needing the shelter of the law.
Additionally, the tasks serving religion and representing the state's claim to justice, added to the judge's authority. The *qāḍī* was one of the main guarantors of the Islamic identity of the community.[1489] Cases of unlawful enrichment and political side-taking that came with these tasks, though, negatively affected the authority of the judge as a servant of justice and protector of the community.

bb. Specialization With Respect to Further Legal-Judicial Professions

Judges (and jurisconsults) are not the only legal figures within the Abbasid legal institutional order, and specialization became necessary and also occurred with regard to further professions in the legal field.
In addition to the judge there were also other institutions, which provided judicial services and had jurisdictional responsibilities. In fact, the *qāḍi* courts were not the only courts. There existed also the court of arbitrator (*ḥakam*), the market inspector (*muḥtasib*) [1490], the court of complaints (*mazālim*), the court of the police (*shurṭa*)[1491], and the millitary court. Thus, in Islamic law, the control of the law passed through various hands, gradually distinguishing themselves from each other.
Similar to the judge, yet in contrast to the jurisconsult, the following judicial figures, presided over courts, were authorized to terminate cases with sanctioning and binding

[1488] Tillier, *Les Cadis* (2009), p. 571.
[1489] See also Tillier, *Les Cadis* (2009), p. 277.
[1490] On the market-inspector (*muhtasib*) as part of the legal system, see Stilt, *Islamic Law in Action* (2011).
[1491] Gräf, "Gerichtsverfassung und Gerichtsbarkeit" (1955), p. 60 counts the police as a legal actor as it had its own adjudication system for criminal acts.

authority, had authority over enforcing, executive organs, and were appointees of political authorities (except for the arbitrator).

The arbitrator (*ḥakam*) was the judge of the court of arbitration. This court has found its legitimacy in Qur'anīc injunctions and in Prophetic traditions. In pre-Islamic and probably still in early Islamic history, it was the most common form of justice.[1492] After the establishment of a formal *qāḍī* jurisdiction, it was probably still in demand for those that sought a more informal and not-state sanctioned way of solving their legal problems. In the *adab al-qāḍī* literature (Etiquette of the Judge), the courts of arbitration are mentioned and their relationship to the *qāḍī* courts largely clarified. In Khaṣṣāf's *adab al-qāḍī* work, the judgment of a *ḥakam* is valid as long as it is not declared invalid by the judge.[1493] Both parties need to consent to the arbitrator. As long as the arbitrator has not issued his decision, the parties can step back from the arbitration procedure. Once the arbitrator's decision is made, the parties are bound by it. The *adab al-qāḍī* literature tries to bind the arbitrator to some qualifications (sec. 676), similar but fewer than the judge's: the arbitrator is not meant to have been punished by the *ḥadd* crime (Qur'ānically prescribed crimes and their punishment), not be a slave or someone freed from slavery (*mukātab*), blind or a non-Muslim (*dhimmī*).[1494] Excluded from the jurisdiction of arbitration are ḥadd crimes and qiṣās (*talio*) as well as homocide (*qatl al-khata'*) (sec. 675).[1495]

The *muḥtasib* was an inspector of markets and public spaces in general, a legal offical charged with „commanding right and forbidding wrong" as prominent Qur'ānic injunction, and was tasked with patrolling the public streets, especially in the market places, and enforcing law as he understood them whenever he encountered a violation.[1496] Unlike the judge, the market-inspector had the task and the right to act even without a plaintiff, as he was representing public interest.[1497] The market-inspector was both judge-like in that he applied the law and resembled the judge in that regard[1498], and an executive organ at the same time. The *adab al-qāḍī* literature, however, makes no notice to the market-jurisdiction, and establishes no regulations or qualifications.

[1492] Schneider, *Das Bild des Richters* (1990), p. 240.
[1493] On Khaṣṣāf's *adab al-qāḍī* work on arbitration sec. 673-678, pp. 584-587 as well as its role within the judicial order, see Schneider, *Das Bild des Richters* (1990), pp. 237-240.
[1494] Khaṣṣāf, *Adab al-qāḍī*, sec. 676, p. 586.
[1495] Khaṣṣāf, *Adab al-qāḍī*, sec. 675, pp. 585-586.
[1496] Stilt, "Price Setting" (2008), p. 59, specifically on 13-15th century *muḥtasibs* of Cairo.
[1497] Schneider, *Das Bild des Richters* (1990), p. 243.
[1498] Stilt,"Price Setting" (2008), p. 59.

The police (*shurṭa*) also had its court.[1499] The chief of police (*sāḥib al-shurṭa*) had executive-military authority charged with pursuing and punishing criminals, but also a judiciary official who examined the facts and judged the offenders[1500], and thus acted as a penal judge. The Umayyad caliphs often delegated the functions of shurṭa and qāḍī to a single official. Thus, for reasons of expediency, the combined office could be in charge of both criminal and religious law. The judicial authority of the chief of police, however, differed in principle from the authority of the *qāḍī*. Criminal jurisdiction was not part of the *qāḍī's* court.[1501] By law the *qāḍī* was not entitled to initiate a trial. He could judge only those cases brought before him. On the contrary, the chief of police, as the official in charge of public order, could force alleged transgressors to stand trial.[1502]

Also, the army had its own judge, the *qāḍī 'askar*. His court was in theory quite similar to the civilian court in status and function. It was separate only because it was not territorially limited, but attached to particular army units and followed it in its movements. It had competence to judge in military personnel. If an officer brought suit against a civilian, it should go to a civilian court, in the opposite case to the *qāḍī 'askar*. Thus, the defendant's status decided which court had jurisdiction.[1503] The procedure of the military court were somewhat simplified to ensure a rapid decision, but otherwise similar to those of the regular court. *Qāḍī 'askars* are mentioned in the judicial chronicles of Wakīʿ and al-Kindī. However, no reference is made to the *qāḍī 'askar* having had any encounter with the jurisconsults.

Another court, both on the same vertical but also on the higher horizontal level, is the court of complaints (*mazālim*) where we have already seen judge and jurisconsult (dis-)agreeing over the course of law.[1504] The court of complaints is largely ignored in the *adab al-qāḍī* literature[1505], and is not much mentioned in the judicial chroniclers either. Only when a case has previously been discussed at a *qāḍī* court, is the *mazālim* court

[1499] Gräf, "Gerichtsverfassung und Gerichtsbarkeit" (1955), p. 60.
[1500] Bligh-Abramski, "The Judiciary as a Government Tool" (1992), pp. 45-47, p. 45.
[1501] Criminal law (*ʿuqubāt*) was early on excluded from the *qāḍī's* jurisdiction, Johansen, "Zum Prozeßrecht der ʿuqubāt" (1997), p. 477.
[1502] Bligh-Abramski, "The Judiciary as a Government Tool" (1992), p. 46.
[1503] Vikør, *Between God and the Sultan* (2005), p. 184.
[1504] On conflicts of authorities of judge and jurisconsults at the court of complaints, see Chapter Three, I.4.
[1505] See also Schneider, *Das Bild des Richters* (1990), p. 242 who qualifies that the *mazālim* courts with the caliphs presiding over them, are mentioned as part of the theory of state and governance, at best.

mentioned in the chronicles. In practice, they are likely to have played a very important role, even without having passed the *qāḍī court* first.

The aim of the *mazālim* court is to right wrongs (*ẓulm*, from where the word *mazālim* is derived). *Mazālim* are an expression of the sovereign rights reserved to the jurisdiction. Though the caliph or his high delegate presided over the *mazālim* court (this can also be a *qāḍī*), a special official was appointed as the officer of the complaints court (*al-saḥib al-maẓālim*). In some cases, *qāḍā'* and *mazālim* seem to have overlapped.[1506] If, for some reason, the *qāḍī* is not able to put a verdict into effect, because it is beyond his competence or he is compelled by greater strength, then a party may go to the *mazālim* court to try his or her case there. The litigant may also go there directly without passing though the *qāḍī*. The *mazālim* court can also refer a case back to the *qāḍī* court, or even pull a case back from it, if is not satisfied with the result.[1507] Also, when the party feels wronged by the qāḍī, the *mazālim* court is the appropriate place to complain and seek justice. *Mazālim* courts did not adopt the same strict rules of procedure as *qāḍī* courts. For the *qāḍī*, the burden of evidence is on the plaintiff, and the evaluation of the probity of the witnesses is often crucial to the decision made.[1508]

Thus, while there is specialization and differentiation from *qāḍī* jurisdiction recognizable, namely that *mazālim* jurisdiction is adopted where the *qāḍī* jurisdiction comes to its boundaries, some overlap is possible, both personally, by a judge sitting over the *mazālim* court or by the litigant reaching out for the *mazālim* when he could have also first tried with the *qāḍī* court.

To which courts the cases went cannot be answered generally. There was a tendency though for cases between private litigants to go to the *qāḍī* court, although they could also go to a *mazālim* court if one party disagreed with the result.[1509] However, few cases would go directly to a court where the political authorities were themselves in residence, the mazālim court. The *qāḍīs* were considered the primary conflict solvers, such cases with private litigants would seldom end up in the police courts. Cases involving crime and criminal law would on the other hand most often to go to the police court. If there

[1506] See Schneider, *Das Bild des Richters* (1990), p. 242.
[1507] Vikør, *Between God and the Sultan* (2005), p. 191.
[1508] Vikør, *Between God and the Sultan* (2005), p. 191.
[1509] Vikør, *Between God and the Sultan* (2005), p. 198.

was no plaintiff, the case must go there; if there was a victim who claimed redress, the case could go to either court.[1510]

The *ṣāḥibs* (chief officers) of these other courts might also approach a *muftī* for advice, even if they were not obliged to exclusively follow the rules of Sharīʿa law.[1511] The judicial chronicles, however, make no mention of such requests for the formative period.

Within the legal institutional order, the *qāḍī* court seems to have been of central importance. Some overlap with other judicial institutions occurred, and it, at least *ex post*, it does not always seem clear which court would had been in charge. Yet, the overlap occurred on distinct features of adjudication only. For *I. Schneider*, the *qāḍī* court is the only official institution of the law, all other types are to be understood as customary, with little regulation. The *qāḍī* court is not only the most normatively regulated by the *adab al-qāḍī* literature. Significantly, together with the *maẓālim* court, it is the only one bestowed with the authority of the caliph.[1512]

The formation of a professionalized judiciary was accompanied by a change in the occupational title (the shift of the pre- and early Islamic term *ḥakam* (arbitrator) to the title *qāḍī* in the late Umayyad period[1513]), attempts to define more clearly the exact nature of the professional task (and gradually uncouple administrative tasks from adjudication), and increasing efforts to eliminate practitioners who are deemed incompetent by the emergent professionals.

b. Educational Training in Nascent Schools of Law

Professionalization requires educational training to provide the occupiers of the task with the skills required to accomplish their assignment. The exercise of a profession usually requires a specialized, often academic or science-based training. The training is often part of an institutionalized (higher) education and, at times, practical training courses are

[1510] Vikør, *Between God and the Sultan* (2005), p. 198.
[1511] Vikør, *Between God and the Sultan* (2005), p. 201.
[1512] Schneider, *Das Bild des Richters* (1990), p. 244. The office of chief justice (*qāḍī al-quḍāt*) is not counted here as it is a largely administrative post.
[1513] See Dannhauer, *Untersuchungen zur frühen Geschichte des Qāḍī-Amtes* (1975), p. 8.

provided to the aspiring professional to convey knowledge, skills, attitudes, and ethics all related to the profession. This allows him or her, even in difficult situations of a dilemma, to act relatively independently, and in accordance to professional standards. [1514] Having said this, a definition of professionalization based on education is not free of problems as the profession of law can be learned in different ways that include intellectual and crafts-like skills in variant weights.[1515] However, a definition in terms of education establishes welcome links to the institutional structure of each society. [1516]

Within a century and a half of Islam's foundation, distinct teachings and nascent schools of law (*madhhab*, literally "way of proceeding") had emerged that were generally associated with regional centers within the Muslim Empire, as Chapter Three has already illustrated.[1517] Though the consolidation of the Islamic schools of law might have only come about as late as in the 3rd-4th / 9th-10th century, distinct and autonomous legal circles can be traced back to at least the second half of the 2nd/8th century.[1518] During the second and third centuries of the Islamic calendar, a class of jurists emerged who studied jurisprudence under learned specialists and trained themselves in scholarly discussions held in mosques. The jurist-judges received their learning in the nascent Islamic schools, educational circles (*ḥalqa*) of law. Early education took place in a *ḥalqa*, a study-circle, indicating the group of students sitting in a circle and studying under a lecturer.[1519] Many biographies also showed that a student would pick a single teacher, or one teacher after another, from whom he would learn his subjects.[1520]

Students and teachers began to form groups whose members shared the doctrine of their teachers, transmitted it to their own students, and applied it in practice as judges and *muftīs*. Some of these groups developed into schools of law, denoting both a body of positive law and methodological principles, later often ascribed to the eponyms of the school.[1521] These circles differed on methodological questions and on actual rules and practices, i.e. substantial matters. Over the next two centuries, divergences made these

[1514] Siegrist, *Advokat, Bürger und Staat*, (1996), pp. 13-14.
[1515] Rueschemeyer, "Comparing Legal Professions" (1986), p. 427.
[1516] Rueschemeyer, "Comparing Legal Professions" (1986), p. 427.
[1517] See also the emergence of law schools as an institutional basis for scholarly authority, this Chapter Four, III.1.a.
[1518] On the problem of categorizing second and third-century jurists and their texts as belonging to a distinct school, see Tsafrir, "Semi-Ḥanafīs and Ḥanafī Biographical Sources" (1996), p. 68.
[1519] Melchert, "The Etiquette of Learning in the Early Islamic Study Circle" (2004), p. 34.
[1520] Wakīʿ, *Akhbār al-quḍāt*, III, p. 150. For further examples see Melchert, "The Etiquette of Learning in the Early Muslim Study Circles" (2004), pp. 34-35.
[1521] Peters, "Individual Effort of Legal Reasoning" (2009), p. 224.

legal conventions evolve into distinct schools of legal thought and practice. The circles and schools established autonomously, and were free from state intereference; there was no state sponsorship or state involvement in the teaching and studying of the law. This notwithstanding there was an early preference for first the Medinan school of law, later the Ḥanafī school as recruitment basis for the judiciary. While the preference for the Medinan school was due to the ascription that they were closest to Prophetic customs[1522], the later inclination towards the Ḥanafī school is largely ascribed to Abū Yūsuf who not only was an eminent Ḥanafī legal scholar but also the first *qāḍī al-quḍāt*.[1523]

It cannot, however, be stated with certainty which curriculum the studied jurists that turned into judges enjoyed. It is commonly known that early Muslim education included philology, grammar, rhetoric, literature, Qur'ānic exegesis, readings, ḥadīth studies, jurisprudence, and dogmatic theology. Most instruction probably took place in mosques, in part because of their open and public character, for the same reason some preferred adjudication to take place in mosques.[1524] To exemplify the educational background of one of the earliest Islamic judges, Sharīk (d. 177 or 179/ 793 or 795)[1525] *qāḍī* of the Iraqi city of Kufa, travelled from the East of Bukhara to receive his education in Kufa, which has established itself from early on as a city of legal learning from where the Ḥanafī school was later to emerge.[1526] In Kufa, he sought a teacher with whom he studied the Qur'ān, the Sunna, consensus (*al-jamā'a*) and customary law (*qawmī*).[1527]

Additionally, training material was provided in the form of manuals on the "etiquette of judges" (*adab al-qāḍī*), probably intended to be also used in class. Early *adāb al-qāḍī* works emerged over a stretch of time out of group discussions between teachers and students, as pointed out also in Chapter Two.[1528] Jaṣṣāṣ' *adab al-qāḍī* commentary includes many casuistic passages with *masā'il* (legal questions), something that may or may not be an indicator of an audience posing questions on fictive or real legal cases.

[1522] On early Abbasid preference for the the Medinan school, see Chapter Four, III.1.e.
[1523] Doubting the role of Abū Yūsuf in Abbasid preference for the Ḥanafī school of law and instead seeing an even earlier bend towards Ḥanafism, Tsafrir, *The History*, (2004), p. 21-22. H. Kassassbeh notes that there was no official Ḥanafī "doctrine" in place, Kassassbeh, *The Office of Qāḍī* (1990), pp. 74-76.
[1524] Berkey, "Education and Training: Islamic Law" (2009), p. 396.
[1525] Wakīʿ, *Akhbār al-quḍāt*, III, p. 168, indicating the death year as 177, or Wakīʿ, *Akhbār al-quḍāt*, III, p. 150, noting the death year as 179.
[1526] On Kufa as city of legal learning, Melchert, "How Hanafism Came to Originate in Kufa" (1999).
[1527] Wakīʿ, *Akhbār al-quḍāt*, III, p. 150.
[1528] On *adab al-qāḍī* literature emerging out of a class room situation, see Chapter Two, IV.

They served as preparatory readings for soon to be judges and the classes were held by judges[1529] Teaching and practicing were strongly intertwined, judges conveyed their judicial experiences in class, and students wrote them down[1530] or manuals were written by judges themselves.[1531]

In fact, the *adab al-qāḍī* literature entails a characteristic that makes it prone to serve as training material: it leaves out laws that are non-judiciable. This is striking given that Islamic law entails and law books typically start with the laws of rituals (*ʿibadāt*), which however have no place in the *adab al-qāḍī* literature. Also, theoretical and abstract ideas, such as the role of the judge within the state system are kept at a minimum or are not even mentioned[1532], compared with the vast casuistry and social and procedural rules for *qāḍīs*. *Adab al-qāḍī* literature thus delivers specific information for the concrete careers of judges, with practicable use capturing the normative ideal for every judge. [1533]

The steady improvements in legal education and in training of judges also reflected the increased availability of systematic legal education in the legal circles and nascent schools of law (*madhhab*).[1534] The eagerness to establish these schools reflects both the knowledge base of a profession and the efforts of early elite regarding the trajectory of the occupation.[1535] Also, a shared education often is an important criterion for social group definitions. [1536] With its peculiar patterns of exclusiveness, privileged association, common outlook, and esprit de corps based on a shared "social honor", a shared education is one of the major foundations of "status group" formation, in the sense of *Max Weber*. According to sociologist *D. Rüschemeyer*, the character of a shared legal

[1529] Schneider, *Das Bild des Richters* (1990), p. 173.
[1530] Khaṣṣāf /Jaṣṣāṣ, and probably the translated part of Māwardī, Schneider, *Das Bild des Richters* (1990), pp.171-173.
[1531] On the question-answer structure of Khaṣṣāf's *adab al-qāḍī*, and the fact that Khaṣṣāf was a judge. More generally, most *adab al-qāḍī* works seem to have emerged out of a teaching setting and many *adab al-qāḍī* authors were judges at a certain point in their life, see Chapter Two, IV.
[1532] Shāfiʿī makes no mention of the *qāḍī* in the overall state system.
[1533] Schneider, *Das Bild des Richters* (1990), p. 173.
[1534] Similary, a comparative perspective shows that the professsionalization of the judiciary is linked to the development of legal thought in the scholarly field. As a European example, the professionalization of the judiciary in medieval church in Italy in the thirteenth century is recflected in the development of systematic schools at Bologna and the growing engagement with the legal system of the *ius commune*. Thus, by the end of the thirteenth century, the Italian judiciary (*iudices*) was constituted by men with substantial legal knowledge. Before that, the judiciary was not required to hold professional credentials, familiarity with ecclesiastical law was no prerequisite for the exercise of judicial authority. When the clergy judiciary encountered situations where technical legal knowledge became crucial, as was regularly the case, they were expected to seek guidance from legal experts see Brundage, *The Medieval Origins of the Legal Profession* (2008) p. 373; Fried, *Entstehung des Juristenstandes* (1974), pp. 144-171; pp. 227-245.
[1535] Berkey, "Education and Training: Islamic Law" (2009), p. 396.
[1536] Rueschemeyer, "Comparing Legal Professions" (1986), p. 428.

education thus is a critical factor determining whether a legal profession functions as a cohesive social group.[1537] Both jurist-judges and jurisconsults and legal scholars have both gone through the legal education in circles, and later schools, so that social differences *qua* education cannot be established.

Though the *adab al-qāḍī* literatur has laid down qualifications of suitability of judges going back to the early as the second/eighth century, if not earlier, the question of legal competence was recurringly discussed.[1538]

One example shows that there are other intellectual qualifications than legal ones sought after: Muḥammad b. Abī Rajā al-Khurasānī (d. 207/822) was appointed judge in the city of al-Manṣūr (Baghdad) and is reported to have belonged to the school of *ahl al-ra'y* (supporters of opinion to trump a weak *ḥadīth*). He is documented to have had no knowledge of the theory of law (*uṣūl al-fiqh*) but much rather was the most knowledgeable in the field of accounting and minutiae (*ḥisāb wa daqā'iq*) and that he was good in making analogies (*muqāyasah*).[1539] Though this judge must have had intellectual learning, as he documented as a member of the school of the people of opinion, he was not chosen for his background in law as he had none. Instead, it was his practical knowledge, craft-like in the sense of empirical[1540], in opposition to a systematic, studied engagement with the law.

There could be many reasons for the employment of non-jurist judges. One, as just indicated, was that some had particular qualifications, like accounting, which made the appointment of non-jurists attractive, or maybe even necessary.

Judges with particular mathematical skills or skills in (family) genealogy, were important for commercial law cases, and in particular cases of inheritance law. These responsibilities, though not specifically legal, were nevertheless required for the profession of law and were grounded in a specific competence as well. In cases of inheritance, qāḍīs were in need of experts who could divide property among the persons entitled to inherit in accordance with Sharīʿa laws of inheritance. Such an expert was known as distributor (*qāsim*), and was paid from the public treasury.[1541] Some have

[1537] Rueschemeyer, "Comparing Legal Professions" (1986), p. 428.
[1538] On the criteria for the eligibility of the judiciary in the *adab al-qāḍī* literature, see Chapter Two, V.1.a. and on legal education as in particular.
[1539] Wakīʿ, *Akhbār al- quḍāt*, III, p. 289.
[1540] See Parsons, "Professions" (1968), p. 537
[1541] The very author of the early Ḥanafī *adab a-qāḍī* word, Khaṣṣāf (d. 261/874), was a jurist and specialist in questions of inheritance. This expertise required good calculation skills and this task was ususally

become legendary judges based on their expertise in the science of genealogy which they applied in cases of inheritance law. This was the case withʿAbd Allāḥ b. Shubruma, qādi of Kufa at the beginning of Abbaside period[1542], and Khālid b. Thalīq, qāḍi of Basra under al-Mahdī. [1543] Slightly later, Abū al-Bakhtarī Wahb b. Wahb, *qāḍī* of ʿAskar al-Mahdī at the time of al-Rashīd, then Chief Justice after Abū Yūsuf, enjoyed a good reputation as genealogist (*nāsīb*).[1544] Judge ʿUbayd Allāh b. al-Ḥasan had himself the genealogical and family knowledge that allowed him to divide the family heritage in a just manner. [1545]

Also, in a widely expanding Empire, the number of judicial posts increased quicker than the circles of law could provide candidates for. The desperate need for more judges could explain why some jurists were threatened with beatings when they refused to accept *qāḍi* positions.[1546]

An empirical, reasonable engagement was the law seems to have been previously held in high regard: Jurist and later judge ʿUbayd Allāh b. al-Ḥasan al-ʿAnbarī stressed the cognitive faculties first of all.[1547] Studying the knowledge of the first *qāḍīs* in the 1st/ 7th century, *G.H.A. Juynboll* underlines that some badly knew the law and that they rather trusted their common sense (*ʿaql*), and prefered to take advice on specifically legal questions.[1548] At the end of the Umayyad era, the governor of Kufa, searching for a new *qāḍī*, had specified that he wished a reasonable man (*ʿāqil*). [1549] Even during the Abbasids we would find some individual examples where the stress on the professional's skills is on reason: *Qāḍīs* such as Qutayba b. Ziyād, *qāḍī* of Baghdād under al-Ma'-mūn, gifted with an intelligence leading to an exemplary understanding (*fahm*), left since then a particularly enduring memory in the sources.[1550]

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delegated by the *qāḍī* to specific persons. Schneider, *Das Bild des Richters* (1990), p. 153. Surty, "The Ethical Code" (2003), p. 159.

[1542] Al-Jāhiz, *Al-bayān wa-l-tabyīn*, I, p. 336. On the social role of the genealogists at the beginning of Islam, see Cheddadi, *Les Arabes et l'appropriation de l'histoire* (2004), p. 75. Tillier, *Les Cadis* (2009), p. 193.

[1543] Ibn al-Nadīm, *al-Fihrist*, p. 151, See also Cheddadi, *Les Arabes et l'appropriation de l'histoire* (2004), p. 75. Tillier, *Les Cadis* (2009), p. 193.

[1544] Ibn al- Nadīm, *al-Fihrist*, p. 161. Tillier, *Les Cadis* (2009), p. 193.

[1545] See the inheritance case in Wakīʿ, *Akhbār al-quḍāt*, II, p. 119.

[1546] See judicial candidates refusing the office, and burden, of adjudication, Chapter Two, IV.

[1547] On Al-ʿAnbarī see Chapter Two, II.3.

[1548] Juynboll, *Muslim Tradition*, p. 87.On the example of judge Sawwār, gifted with reason, Wakīʿ, *Akhbār al-quḍāt*, III, p. 130.

[1549] Wakīʿ, *Akhbār al-quḍāt*, III, p. 130.

[1550] Khaṭīb, *Ta'rīkh Baghdād*, XII, p. 459; Ibn Abī l-Wafā', *al-Jawāḥir al-muḍiyya*, I, p. 413. Tillier, *Les Ca*dis (2009), p. 193.

Whether in these cases it seems appropriate to speak of legal *honoratiores*, is debatable. Legal *honoratiores* were not professional legal experts, but were persons acknowledged as repositories of legal knowledge because of their prestige and influence in society.[1551] These examples, and other biographies in the judicial chronicles, do not indicate that judicial candidates in the formative period were appointed as judges exclusively because of their socio-economic prestige or influence in society. Where detailed biographical information is available, they refer to particular knowledge, skill or talent that explained the choice for the candidates.[1552] However, as mentioned before, most judges in Iraq during the Abbasid period had an identifiable legal background[1553], and went through the circles of legal learning.

Having said this, with the coming years, the judgeship position closed towards non-jurists and was becoming a jurist-only profession.[1554] Precisely because the judiciary was almost entirely in the hands of judges with a legal education (jurist-judges), Wakīʿ was so concerned to see judge Khālid, a learned scholar but not a jurist, acting as judge.[1555] It is careers like these of judge Khurasānī and judge Khālid that mark the transition from empirical (rule of thumb), non-specialized to specialized, systematic, and intellectual approach to the occupation, indicating a process of professionalization.[1556]

As for judicial training, Wakīʿ remarks that the education of a judge went further than that of a jurist: a judge received training as an apprentice working with a judge. [1557] It is likely, so *W. Hallaq*, that students or apprenctices aspiring to a career in judiciary frequently attended the court, accompanying jurisconsults.[1558] Unfortunately, no other

[1551] Weber, *Wirtschaft und Gesellschaft* (1980), pp. 456-467 on the "Rechtshonoratioren", p. 456-468. In recent debates of legal history, the term honoratiores is re-introduced as „legal experts", see Schumann, "Beiträge studierter Juristen und anderer Rechtsexperten" (2007), pp. 443-461.
[1552] Later, in the late 9th/early 10th century, the *qāḍī* title indeed becomes merely a honorific title and reflects the powers at the imperial court, i.e. the influence and prestige as reflected with the caliph, his powerful ministers and state secretaries, Tillier, *Les Cadis* (2009), p. 184, Tsafrir, *The History* (2004), p. 37.
[1553] Tillier, *Les Cadis* (2009), p. 191.
[1554] Van Ess, *Theologie und Gesellschaft* (1992), II, p. 124. Tillier, *Les Cadis* (2009), p. 191, Johansen, "Wahrheit und Geltungsanspruch" (1997), p. 988, 991.
[1555] On judge Khālid and his dispute with the jurisconsults, Chapter Three, 1.2.a.bb
[1556] See Parsons, "Professions" (1986), p. 537 on the transition from non-specialized to specialized, from empirical ("in the older sense of the word") to systematic. See also the example of judges in the empirical sense in the German city of Lübeck provided by Cordes, "Die Lübecker Ratsherren als Richter" (2010), sec.11.
[1557] Wakīʿ, *Akhbār al-quḍāt*, I, p. 350. Masud, "The Study of Wakīʿ's" (2008), p. 122.
[1558] Hallaq, *Origins* (2005), p. 89.

information is available on the vocational training provided. Also, we can only speculate if some clerks who had worked for judges later became judges themselves; the names of the clerks are seldomly documented, so that we do not know if some judges previously had professional experiences before beginning their post.

However, from the late 3rd /9th century onwards, a hereditary judicial line emerged, which had probably had its tacit beginnings even earlier. "Judicial dynasties" became visible, and sons took over the judiciary from their fathers. Fathers prepared their sons for the position of judge, and provided them a paternal education geared towards the judge position.[1559]

But does the definition of a education legal training not also necessitate an educational system that differentiates law from an education in theology, and a general education where the studies of the law serves as the conventional training of the elites?[1560] The fourth/tenth century, and thus slightly later than the period under study, demonstrates that regular courses of study with clearly identified teachers and students in law (*fiqh*) as distinct from *ḥadīth* as a rather theological subject emerged.[1561]
It has already been stated that the differentiation of law from the "matrix of religion" (Parsons) is not serving the Abbasid example, as the very Islamicization of the judical system through the Abbasids accelerated, rather than obstructed, the professionalization of the judiciary.[1562]
In concreto, it should be underlined that the sources do know a distinction between jurist (*faqīh*) and other scholars, of *ḥadīth*, of theology, or else. Also, there was a particular legal debate distinguishing the scholars into the "rationalists" and "traditionalists" that was crucial for the question of interpretation and textualism as the legal frame of its time. The legal study circles as the forerunners of the schools of law have equally played a crucial role in "legalizing" the Islamic sciences of their time. Also, the legal learning circles that came to be known as law schools increasingly served as recruiting pools for the office of the judge.

[1559] Kindī, *Kitāb al-Wulāh*, pp. 331, 495, 551; Ibn al-Jawzī, *Muntazam, VI,*, p. 174; Escovitz, The *Office of Qāḍī al-Quḍāt* (1984) pp. 94-99; Schimmel, *Kalif und Kadi* (1942), p. 93; Mez, *Renaissance*, p. 221; Gottheil, "A Distinguished Family" (1906), p. 273.
[1560] Rueschemeyer, "The legal profession" (1977), p. 104.
[1561] Melchert, "The Formations of the Sunnī Schools of Law" (2004), p. 354.
[1562] On Parsons "matrix of religion", see Chapter Four, I.2.

Thus, the generally strong religious frame did not hinder the legal scholars to separate, at least in part, the subset of law from the spheres of theology, establishing their own terminology, and increasing educational trajectory.

Educational training for the judges-to-be proved to be an increasingly institutionalized form of preparation for the judiciary on its way to a jurist-only profession. Judges acquired an identifiable legal background through the circles of legal learning and thereby made a significant step towars the professionalizatio of the judicial profession.

c. Establishing Qualifications: Entry Examination by Caliph and *Qāḍī al-Qūḍāt*

Professionalization also requires establishing qualifications, through examinations and titles, for the incoming professionals to safeguard a standard of quality and performance of all practitioners.[1563]
It is not seldom that we find the certification of graduates as competent law practitioners as a common technique of institutional control for a certain standard of practicing the law. Often the education is provided under state sponsorship, or state agencies at least control the certification procedure. [1564] As a matter of fact thought, the educational system in the learning circles or nascent school did not provide certification from early on. Around the third/ninth century, with the emerging development of professionalizing schools of law, and the institutionalization of legal studies, no longer could any student of law claim mastery of his subject arbitrarily. He now had to be formally educated, pass qualifying examinations, and receive the licence proclaiming him doctor of the law (*ijāzat al-tadrīs*).[1565] The period under study, from the beginning of Abbasid reign until the reign of caliph al-Mutawwakil, when the Empire was still comparatively strong, however did not yet know the licencing of knowledge (*ijāza*). Instead, caliphs and chief justices were recorded examining judicial candidates themselves.

Instead of formal qualifications through examinations and titles, the chronicles refer us to entry exams conducted by the caliph or the chief justice (*qāḍī al-qūḍāt)*, testing the

[1563] Siegrist, *Advokat, Bürger und Staat*, (1996), p. 13.
[1564] Rueschemeyer, "Comparing Legal Professions" (1986), p. 428.
[1565] Makdisi, "Magisterium and Academic Freedom" (1990), p. 118, 119. About the approximate dating of licences in teaching law, see Melchert, *The Formation of the Sunni Schools of Law* (1997), p. 171.

capacity of logical reasoning, legal knowledge, and judicial understanding of the judicial candidates.

Abbasid caliphs were involved in the *qāḍī's* selection procedure, indicating that the candidates for the post of the judiciary shall be from the learned and be examined if fit for the post. Caliph Harūn al-Rashīd personally interviewed three judicial candidates for the post as judge for the city of Kufa. [1566] Previously, we had already become acquainted with chief justice Abū Yūsuf examining the willingess of judges to seek judicial consultation. [1567]

Similarly, caliph al-Ma'mūn (r. 198-218/ 813-833) asked his chief judge Yaḥyā b. Aktham to recruit and interrogate the scholars of law for the *qāḍī* position.[1568] The chief justice examined one of the candidates, asking:

- What do you say about the following case: two men each marry the mother of one another and each of the two procreates a son with his wife. What is the family link which joins both children?

- The man did not know what to answer, and Yaḥyā told him:

Each child is, via his mother, the paternal uncle of the other.[1569]

The story reflects that examining judicial candidates was taken seriously enough for the chief justice himself to interview several candidates before finally settling for one and appointing him.

The story also reflects that the capacity of logical reasoning and intelligence (*'aql*) of judges-to-be was, or remained, of high priority. Though legal knowledge and the integrity of the judicial candidate seemed to have been important[1570], this report shows that it was not to much use if the *qāḍī* was not capable of including social facts. The question posed by the chief justice obviously had the rights and duties of family and inheritance law in mind, which were very likely problems confronting *qāḍīs* on a regular

[1566] Wakīʿ, *Akhbār al-quḍāṭ*, III, pp. 184-185.
[1567] Wakīʿ, *Akhbār al-quḍāt*, III, p. 316. See Chapter Three, I.1.a.aa.
[1568] Ibn Qutayba, *'Uyūn al-akhbār*, I, p. 105; Ibn Ṭayfūr, *Tarīkh Baghdāḍ*, 258.
[1569] Ibn Qutayba, *'Uyūn al-akhbār*, I, p. 105.
[1570] See the letter of lettre of ʿUbayd Allāh b. al-Ḥasan al-ʿAnbarī [to caliph al-Mahdī], see Chapter Two, II.3. and the qualifications as listed in the *adab al-qāḍī* literature, see Chapter Two, V.1.a.

basis. How to divide an inheritance if, armed with sufficient knowledge of law, one was unable to differentiate the most entrenched family links?[1571]

But next to questions of logical understanding, legal knowledge was also a subject of examination: Caliph al-Mahdī himself examined judicial candidate ʿAlī b. Mishir before appointing him judge to the Iraqi city of Mosul, asking him what he thought of (dealing with) false testimony (*shahādat al-zūr*).[1572] Al-Mishir stated that there were several legal views on dealing with false testimonies, one of famous Umayyad qāḍī Shurayḥ and of caliph ʿUmar al-Khattāb (companion of the Prophet and second caliph after the passing away of the Prophet, which explains the importance of this legal precedent). *Qāḍī* Shurayḥ prescribed that you bring a snake and tell the witness that he issued a wrong statement so that you know- from his reaction- that his testimony is false. The teaching of Prophetic companion and previous caliph ʿUmar b. Khattāb says that the person is to be punished forty lashes, his head to be shaved, his face blackened and that he will have to (publicly) run in circles and that his imprisonment should be long. Of these two legal options, caliph al-Mahdi ordered the judge to apply the teaching of ʿUmar al-Khattāb.[1573] Caliph al-Mahdī thus seems to have been satisfied with the answers he received and instructed the judge with his preferred legal opinion he would like to see applied at his court.

Despite the lack of formal examinations, the examples show, that the Abbasids had an interest in safeguarding the suitability of their candidates, to guarantee a comparatively standard level of quality and performance.

A further substitute for formal examinations and titles could be seen in the ruling authorities' respect for the qualifications intended to ensure a judicial standard.
I. Schneider argues that the increasingly standardized and systematized qualifications as laid down in the *adab al-qāḍī* literature in particular served to provide the ruler with mandatory conditions and qualifications for the selection of the judiciary. She argues that the rulers felt bound and had themselves an intererest in providing an undisputable judiciary. In fact, the conditions and qualifications were referred to by official

[1571] Tillier, *Les Cadis* (2009), p. 193.
[1572] Wakīʿ, *Akhbār al-quḍāt*, III, p. 220.
[1573] Wakīʿ, *Akhbār al-quḍāt*, III, p. 45.

appointment certificates.[1574] If necessary, investigations into the qualifications were made necessary, as the examples show.[1575]

d. Monopoly of Occupation: Appointment Certificate and Insignia

Professionalization requires a monopoly of function or occupation, a closure between those who are professionals and lay people.[1576] The monopoly of the judiciary is marked by the appointment certificate which is the exclusive marker of legitimate acts as judges or chief justices. These caliphal appointments were manifested through a certificate of appointment handed over to the judge prior to his taking office.[1577] In the following, judge Abū Ḥasan Ziyādī recalls how he was handed over his appointment certificate:

"Al-Ma'mūn, the Commander of the Faithful produced a deed of investiture (*'ahd*) from beneath his oratory (*muṣalāhu*), which he handed to me, telling me that he appointed me judge of the Western side [of Baghdad]. This, he said, is my deed of investiture, and fear God; I have ordered a certain sum to be paid you as allowance (*razāq*) every month. Abū Ḥasan continued to occupy this office through the days of Ma'mūn [for twenty years]."[1578]

The appointment certificate almost always came in writing and was handed to the judicial candidate by the caliph, the chief justice or the governor.[1579] It determined the local jurisdiction of the *qāḍī*, and often the monthly salary.

No appointment was valid without the appointment certificate. In the late third/ninth century, appointments were being increasingly read out in the mosque, the place of communality.[1580]

[1574] Schneider, *Das Bild des Richters* (1990), pp. 233-234.
[1575] The caliphs willingness to investigate into the qualifications of the judicial candidate is documented also in al-ʿAnbarī's official appointment certifcate, Wakīʿ, *Akhbār al-quḍat*, II, p. 91; Schneider, *Das Bild des Richters*, (1990), p. 175, refering to Māwardī, *Adab al-qāḍī*, sec. 161, p.174.
[1576] Siegrist, *Advokat, Bürger und Staat*, (1996), p. 14; Hesse, *Berufe im Wandel* (1972), p. 131.
[1577] Bakar, "A Note on Muslim Judges and the Professional Certificate" (1999), pp. 467–85.
[1578] Ṭanūkhī, *Nishwār al-Muḥādarah*, as translated by Margoliouth, *The Table-Talk of a Mesopotamian Judge* (1921-1922), p. 234.
[1579] Qadī Saʿīd b. Salmān al-Musāḥiqī's notice in Wakīʿ shows that caliph al-Mahdī (r. 775-785) made these appointments in writing, Wakīʿ, *Akhbār al-quḍāt*, I, p. 238; Masud, "The Study of Wakīʿ's" (2008), p. 120. Example o appointment letter written in the name of the caliph and issued by the governor, see Wakīʿ, *Akhbār al-quḍāt*, I, p. 190, Masud, "The Study of Wakīʿ's" (2008), p. 121.
[1580] Kindī, *Kitāb al-Wulāh*, p. 485.

This was to introduce the new judge to the people. In the case of Egypt, the judicial chronicles mention for instance the reading out of the appointment certificates.[1581]
The appointment of Mālik b. Saʿīd al- Fāriqī was completed by reading out his appointment certificate in 398/908, on a Friday right before prayer[1582], as the Friday noon prayer (*jum'ah*), is considered a collective obligation on Muslim men. The reading out of the appointment certificate on exactly that day and time has the maximum publicizing effect. The monopoly comes through the appointment certificate issued by the caliph. And the appointment as monopoly was increasingly made known to the population of the local jurisdiction by reading it out in the mosque.

A professional monopoly is usually underlined and visualized through insignia. The monopolized legitimacy to adjudicate is usually manifested by a judicial dress code. What were the insignia and judicial dresses that were exlusive to Abbasid judges, signalling their professional monopoly?

No special dress for *qāḍī's* was prescribed. However, colour appears to have had particular significance under the Abbasids, whose official colour was black. *Qāḍī* Khatīb Faqīh adhered to this colour, and it is said that a *qādi's* refusal to wear back was sign of adherence to the Ummayyad cause, which would constitute a threat to his position[1583]:

> Judge al-Ḥārith, appointed in 237 by caliph al-Mutawakkil[1584], was requested to wear black clothes, he refused. His friends frightened him by saying: The wrath of the sultan could hit you. And they said: it is said that you are a client of Banī Umayyah. And he agreed to wear black clothing made of wool.[1585]

The high cap (*qalansawah*) was worn with a black headgear (*ṭaylasān*). These were insignia which the *qāḍīs* and jurists claimed as their privilege, externally signalling their authority, and being a means by which they inspired respect. *Qāḍīs* also wore the

[1581] See for example the appointment certificate of *qāḍī* Hārūn b. Ibrahīm in 313/925, Kindī, *Kitāb al-Wulāh*, p. 482; of *qāḍī* Aḥmad b. ʿAbdallāh b. Qutayba in 321/ 934, Kindī, *Kitāb al-Wulāh*, p. 485; and ʿAbdallāh b. Aḥmad b. Suʿayb in 329/941, Kindī, *Kitāb al-Wulāh*, p. 489. On the public announcements of appointment certificates see Schneider, *Das Bild des Richters* (1990), p. 30.
[1582] Kindī, *Kitāb al-Wulāh*, p. 496; Ibn Ṭulūn, *Quḍāt Dimashq*, p. 83, 84, 95, 153, 245 (mostly Fridays after noon prayer). However, Kindī, *Kitāb al-Wulāh*, p. 613 also refers to the reading out of appointment certificate only in the palace for the inauguration of a *qāḍī al-quḍāt*, Schneider, *Das Bild des Richters* (1990), p. 30.
[1583] Kindī, *Kitāb al-Wulāh*, p. 469. See also Surty "The Ethical Code" (2003), p. 155.
[1584] Kindī, *Kitāb al-Wulāh*, p. 467.
[1585] Kindī, *Kitāb al-Wulāh*, p. 469.

sawadā', a special black robe that was rather like a shawl, over their shoulders.[1586] The *qāḍīs* Ismaʿīl, Yaḥya ibn Aktham and Aḥmad ibn Abī Dawūd are reported to have worn the *sawadā'* and *khuff* (top-boots).[1587]

In Egypt, so al-Kindī's judicial chronicle, the clothing of its scholars, jurists, and the judges (*shuyūkh, ahl al-fiqh wa 'adālah*) was the long *qalānis* (plural, singular: qalansuwah), the headgear. And they boasted with it. When judge Ibn Abi Laith was appointed in 226, he ordered the taking off of the headgear for everyone who is not a judge, no one should be wearing the garments of the *qāḍī*, making them resemble judges. They refused to follow the order of taking down the *qalānis*. Then judge Ibn Abī Laith sat in the court session (*majlis*) and he gathered the scholars (*shuyūkh*) around him, wearing the *qalānis*. Two men came to beat up the heads of the scholars until they took of their *qalānis*. On that day, so the narrator recalls, I saw that the *qalānis* were thrown on the streets and the children were playing with it. After that, they did not attend the court session (*majlis*) of Ibn Abī Laith wearing a *qalansuwah*. Only one person hung on to wearing it". [1588] Clearly, this was an attempt (by judge Ibn Abī Laith) to establish a hierarchy between the judge and the scholars, forbidding the latter to appear similar in appearance to the former.
So while Ibn Abī Laith (almost) succeeded in having a distinct garment established for the judiciary, this cannot be said for all judges everywhere. The example of Ibn Abī Laith rather shows that scholars, jurists and judges, i.e. the (legal) elite generally used to clothe with the high headgears, the *qalansuwahs*.

Another monopoly considered could be the insignia as they accompany the seating arrangement in the court session (*majlis*). The court as a "bureau" is discussed further below on aspects of bureaucratization. This is why here the seating arrangement alone should be considered. But no striking monopoly of seat can be detected either: The judge had a seating rug, but Wakīʿ noticed that the judge would also sit on the same rug as a litigation party.[1589] There are examples of judges sitting in front of the litigants on a slightly elevated rug.[1590] But there is no seating arrangement that is *per se* distinct from

[1586] Abū al-Faraj al-Iṣfahānī, *Kitāb al-Aghānī*, V, p. 295. Surty, "The Ethical Code" (2003), p. 155.
[1587] Al-Iṣfahānī, *Kitāb al-Aghānī*, V, pp. 268, 295. Surty, "The Ethical Code" (2003), p. 155.
[1588] Kindī, *Kitāb al-Wulāh*, p. 460.
[1589] Wakīʿ, *Akhbār al-quḍāt*, III, p. 286.
[1590] Judges sitting on elevated prayer rug before the litigants, Al-Kindī, *Kitāb al-Wulāh*, p. 375.

any one elses. With a monopoly of the occupation did not come the monopolizing of space.
This leaves the appointment certificate issued through the caliph (or his delegated representative) as the only constant element of the monopoly of the profession of judiciary.

e. Professional Code of Conduct: *Adab al-Qāḍī* Manuals

The concept of "profession" has often lead to codes of conduct capturing an idealizing character, whether it was used to assert occupational ideals or whether it became the centrepiece of a rosy self-presentation to the public.[1591] In either case, it has meant that members of a profession were meant to specially devote their occupation to the welfare of their clients, the litigants seeking justice; that they also bear a special responsibility for the community at large; that they form a body of people who as a group ensure (or should ensure) competence, as well as devoted and responsible action; and that in turn they are entitled to freedom from lay interference, to a special kind of respect and honor, and to an appropriate level of income.[1592]

These aspects are conventionally covered in professional codes of conducts. As such, the *adab al-qāḍī* literature can be counted as a significant contribution to the professionalization of the judiciary. It had laid down normative rules for the judicial profession, and crafted a professional culture, with recommendations for the judge inside the court, like professional codes regarding the judge's comportement in court, regarding the relationship between judge and witnesses, and the relationship between judge and litigants. Importantly, the *adab al-qāḍī* genre also includes norms regarding the professional code of conduct outside of court, like appropriate decisions and behaviour concerning public events such as banquets, prayers, funerals.

The increasing production of *adab al-qāḍī* works[1593], also evidences that "professionalization" can serve to describe the change from a purely theoretical to an

[1591] Rueschemeyer, "Comparing Legal Professions" (1986), p. 429
[1592] Rueschemeyer, "Comparing Legal Professions" (1986), pp. 442-443.
[1593] On the increasing production of *adab al-qāḍī* works see Chapter Two, IV.1.

applied academic field[1594], from the study of law to a study preparing for the task of adjudication. It is the applied science, or the applied knowledge that scholars provided, to some extent, to the coming generations of judges in the *adab al-qāḍī* genre.

Professionalization theory knows a professional body to oversee the conduct of members of the profession. The supervision of the professional group should remain largely autonomous.[1595]

No professional association representing the interests of the profession of the judges existed at that time. The typical aim of professional association is, among other things, to create a corporate and professional identity.[1596] But this can also be achieved through a joint education and training and through a professional code of conduct that is given out be followed and controlled. Such disciplinization is itself a means to guarante the actual aims of professionalization.[1597]

Other than rely on the self-controlling efforts of the judges, the chief justice and jurisconsults played a relevant role in supervising the conduct of the judges. Chief justice Abū Yūsuf, for instance, is reported to have paid visits to *qāḍīs*, and to have tried to investigate their affairs and conduct.[1598]

The incident in which a judge was sanctioned by the caliph for not following the chief justice's instruction on the laws of testimony was already mentioned.[1599] In this case chief justice Yaḥya b. Aktham and the *qāḍī* of Madīnat al-Manṣūr, Bishr b. al-Walīd al-Kindī brought their case before the caliph to eventually side with the chief justice as the superior professional instance. [1600]

In practice, a *qāḍī* had to respect the instructions of the chief justice, at the risk of giving an account of it in front of the caliph in person. But it is also significant that the chief justice refers the case to the caliph and does not himself take the decision to punish the noncompliant *qāḍī*: he only had the power to bring the affair before caliph al-Ma'mūn and, possibly, to recommend him on what action to take in this case.[1601] Wrong

[1594] For this understanding of professionalization see in particular, Parsons, "Some Problems Confronting Sociology" (1959), p. 547-558, particularly, p. 550, Hesse, *Berufe im Wandel* (1972), p. 34.
[1595] Siegrist, *Advokat, Bürger und Staat* (1996), p. 13.
[1596] Hesse,"Berufe im Wandel" (1972), p. 72.
[1597] Hesse, "Berufe im Wandel" (1972), p. 72.
[1598] ʿArnūs, *Tarīkh al-qaḍā'* (1934), p. 97; Surty, "The Ethical Code" (2003), p. 157.
[1599] See Chapter Three, I.2.a.bb.
[1600] Wakīʿ, *Akhbār al-quḍāt*, III, p. 272-273.
[1601] Tillier, *Les Cadis* (2009), p. 442.

professional conduct was eventually met with removal by the caliph. There was no other means of disciplining the judge for what would be considered wrong professional conduct.

The chief justice appeared as supervising the *qāḍīs* and he constituted their privileged hierarchic interlocutor once they were in office. Examples of regular relations between a chief justice and other judges, even if rare for Iraq, existed. For example, caliph al-Muʿtaṣim instructed chief justice Ibn Abī Du' ād to claim from the *qāḍī* of Basra the transfer of archives to Baghdad.[1602]
If one considers the chief justice as part of the same profession of the judges, then professional conduct is largely supervised by one of the same profession. However, even then, the decision of how to sanction wrong conduct (or the wrong interpretation of the law), in the end goes to the caliph.

So while chief justice and caliph performed their part in supervising and sanctioning the conduct of the judge, the wider legal community, and the jurisconsults and the community of legal scholars in particular, did not miss their occasions to voice their approval or dispapproval.
The problem of controlling the professional code of conduct of judges is addressed also through the (externally and internally mediated) role of the jurisconsults, or the community of legal scholars in general. Chapter Three has provided plenty of exemplary accounts of jurisconsults controlling, documenting and reporting the wrongdoings of the judges to the caliph, the last and often only instance capable of taking any measure, mostly removal, to sanction disappropiate behaviour, be it legal mistakes or unacceptable behaviour in public.[1603]

f. Towards Full-Time Occupation and Appropriate Salary? Adjudication and Other Jobs

Related to the issue of the separation and differentiation of adjudication from other concerns is the question whether the specialists were involved full time or pursued other

[1602] Wakīʿ, *Akhbār al-quḍāṭ*, II, p. 174.
[1603] On judges behaving in ways considered inacceptable for the profession, e.g. enganging disproportionally in additional business or seducing young boys, see on the former Chapter Three, I.2.a.gg , on the latter Chapter Three, I.2.a.ee.

business as well.[1604] This is a reference point regarding whether the profession can or cannot be fully occupationalized in the sense that the incumbent treats the performance of the function as a full-time job-that is, as his primary job or responsibility, on which he can safely depend for income to meet not only his personal needs but very generally also those of a family. Only then can he operate as an "independent" person.[1605] Full-time occupation as an element of professionalization is seen as a way to ensure not only an appropriate salary, but a means to act indepently, enlarging the range of professional options.

During the Umayyad period, adjudication was only a part-time job, usually combined with some other bureaucratic function, like tax-collection. Although judges were then already paid from the public treasury, their function as judge did not exclude additional jobs. By the end of the Umayyad period, judges were almost exclusively focused on their judical activities. [1606] Wakīʿ, however still documented that the *qāḍī* of the Iraqi city of Wasit under caliph al-Mahdī had cows and sold their milk[1607], and that another had a flock of goats he was herding.[1608] In fact, it was the same *qāḍī* of Wasit who was criticized by the jurisconsults for focusing more on selling his milk, rather than on his judicial business.[1609] Did it depend on what kind of side-jobs judges had? Probably yes, as the additional activity of judges teaching (and possibly being renumerated for it) generated no critique.

Under the Abbasids, judges were increasingly employed full-time, meaning that adjudication as occupation provided for the main source of income. The salary was paid by the caliphal treasury (*bayt al-māl*) and not by the litigant parties since no court fees were levied from the parties. Often, the amount of the salary was included in the appointment certificate, was paid monthly but varied from judge to judge. The salary was not firmly established, they could range from thirty dirhams monthly[1610] to 400 dirham. In 211, judge ʿIsā b. al- Munkadr was granted a salary of 4000 dirham and Wakīʿ records

[1604] Rüschemeyer, "Comparing Legal Professions" (1986), p. 426.
[1605] Parsons, "Professions" (1968), p. 538. Siegrist and Hesse do not make full-time occupation a necessary requirement.
[1606] Coulson*, A History of Islamic Law* (1964), pp. 28-29.
[1607] Qāḍī of al-Wāsit under al- Mahdī, Wakīʿ, *Akhbār al- quḍāt*, III, p. 309.
[1608] Wakīʿ, *Akhbār al-quḍāt*, III, p. 290.
[1609] On the jurisconsults critizing judge Abu Shaybā , See Chapter Three, I.2.a.gg.
[1610] For Ibn Lahīʿa, first *qāḍī* appointed to Egypt by a caliph, under the reign of caliph Abū Jaʿfar, dismissed in 194, Wakīʿ, *Akhbār al- Quḍāt*, III, p. 235.

that he was the first judge to receive this salary. He was also paid a bonus (*ijāzahū*) of 2000 dinar.[1611] Another judge was paid a salary 4000 dinar.[1612] As *R.G. Khoury* underlines, this increase was partly due to a high of prices at the time.[1613] The increase might well be ascribed to counter the effects of inflation.[1614]

Additional bonuses all paid by caliphs seemed to have been common. Bonuses were paid, for example, as reward for loyalty to the law[1615], but were also paid for other reasons, to which we soon return, together with the topic of gifts.

Notwithstanding the possible inflation, the salaries paid nevertheless exempted the *qāḍīs* from exercising a parallel occupation and assured them a high living standard: during the reign of caliph Harūn al-Rashīd (r. 169-193/786-809), a translator from Greek to Arabic would receive 500 dinars for full time translation. At that time a dinar was 4.25 grams of almost pure gold. [1616] The Iraqi jurists of the middle of third / ninth century considered as poor a man who gained less than 200 dirham a year[1617] ; and according to estimates by *E. Ashtor*, a man of the middle of third/ ninth century had to earn at the very least a half dinar a month to live.[1618]

The money received by *qāḍīs*, at least ten times more than this sum, made them therefore rich men, making them meet their needs far above average. Their salaries were comparable to those of the senior civil servants of the administration: at the beginning of Abbasid period, a clerk or secretary (*kātib*) earned 300 about dirhams a month, and about 30 dinars at the beginning of fourth/tenth century. [1619]

[1611] Both sums were paid to the judge in Egypt around 211, Wakīʿ, *Akhbār al-quḍāt*, III, p. 240. Perhaps the high amount of salary was to compensate the judge for his post in a far province.

[1612] Wakīʿ, *Akhbār al-quḍāt*, III, p. 253-254. Dinar was the currency for gold coins, while dirham was the one for silver coins. According to Islamic law, a dinar is a specific weight of 22k gold (917.) equivalent to 4.25 grams, and a dirham is a specific weight of pure silver equivalent to 3.0 grams. Caliph Umar Ibn al-Khattab established the known standard relationship between them based on their weights: "7 dinars must be equivalent to 10 dirhams." http://www.islamicmint.com/dinar_dirham/ [last accessed January 8, 2014].

[1613] Khoury, "Activités scientifiques" (1994), p. 63.

[1614] The amounts of money received by the *qāḍīs* of Iraq rose in a considerable way in the course of the Abbasid period: their monthly salaries were multiplied by five in less than a century, and arrived at round 50 dinars in the fourth/ tenth century. Shaban, *Islamic History* (1971), II, p. 56, 60; Tilliers, *Les Cadis* (2009), p. 268.

[1615] For example, around 254 *qāḍī* Aḥmad b. Badīl al-Shāmī refused to sell land belonging to an orphan whose financial affairs he was administering qua office. When despite a second higher offer and being informed that it is the prince Mūsa b. Bagha who wants to buy the fertile lands, the *qāḍī* refused to sell the land, the prince honoured the *qāḍī* by a financial reward, Wakīʿ, *Akhbār al-quḍāt*, III, p. 97.

[1616] Gutas, *Greek Thought, Arabic Culture* (1998), p. 138.

[1617] ʿAlī, *Al-Tanẓimāt* (1969), p. 160; Tillier, *Les Cadis* (2009), p. 269.

[1618] Ashtor, *Histoire des prix et des salaires* (1969), p. 62. Tillier, *Les Cadis* (2009), p. 269.

[1619] Ashtor, *Histoire des prix et des salaires* (1969), p. 65. Tillier, *Les Cadis* (2009), p. 269.

R.G. Khoury explains the rising salaries with a strengthening of the structures of the caliphate, which increasingly valued the key functions of imperial administration. [1620] The Abbasids thus gave the *qāḍīs* the means to dedicate themselves entirely to their judicial tasks, without needing to additionally exercise a "freelance" job.[1621] Salaries and the creation of full-time occupations signalled an increase in acknowledgment and significance of the judicial profession. The salaries of *qāḍīs* therefore matched, and promoted, their increasing professionalization.[1622] Taken together, the development towards a full time occupation and the payment of a generous salary were steps which did not only enhanced the judges' professionalization but also their authority vis-à-vis others.

However, the salary of judges was a subject of early normative discussions. Early discussion over whether judge should receive any salary or recompensation (*rizq*) for speaking justice as "an act of devotion".[1623] This concept rests on the idea that justice should be rendered for free and that a judge should not be recompensated for fulfilling his obligations.[1624]

In fact, the classical doctrine of the different Sunni legal schools ends up considering adjudication as a "public service" to the interests of all Muslims, and that the *qāḍī* could not therefore accept a salary to fulfil this mission.[1625] This is why the topos emerged to ascribe to men of integrity that they did not take salaries for adjudication[1626], despite the fact that such well-known judges like Ibn Ḥujayra 70/689[1627], considered the embodiment of ideal adjudication, and prominent judge Shurayḥ[1628] of the 2nd/ 8th century were salaried.[1629]

In this sense, Shāfiʿī strengthened the idea that adjudication was a communal and religious task serving the entire Muslim community and that it should not be rewarded in this world, but the next.[1630] He expressed a hesitancy for the imbursement not only for

[1620] Khoury, "Activités scientifiques" (1994), p. 63. See also Mez, *The Renaissance of Islam* (1937), p. 221. Tillier, *Les Cadis* (2009), p. 268. Al-Qadi, "The Salaries of Judges" (2009), pp. 9-30.
[1621] Tillier, *Les Cadis* (2009), p. 269.
[1622] Hallaq, *Origins* (2005), p. 97.
[1623] Tyan, *Histoire de l'organisation judiciaire* (1960), p. 335. Tillier, *Les Cadis* (2009), p. 269.
[1624] Tyan, *Histoire de l'organisation judiciaire* (1960), p. 331. Tillier, *Les Cadis* (2009), p. 269.
[1625] Tillier, *Les Cadis* (2009), p. 272.
[1626] Dannhauer, *Untersuchungen zur frühen Geschichte des Qadi-Amtes* (1975), p. 20-21.
[1627] Kindī, *Kitāb al-Wulāh*, p. 317; Mez, *Renaissance* (1937), p. 211.
[1628] Wakīʿ, *Akhbār al-quḍāt*, II, p. 227 according to whom the monthly salary was 500 dirham; also Khaṣṣāf, adab al-qāḍī, sec.111, p. 110.
[1629] Schneider, *Das Bild des Richter* (1990), p. 74.
[1630] Al-Shāfiʿī, *Kitāb al-Umm*, VI, p. 208. Tillier, *Les Cadis* (2009), p. 270.

the judge but he preferred that the judge, his secretary, his guard over the archives (*ṣāḥib al dīwān*), the guardian over the treasury (*bayt al-māl*) and the muezzin do not get recompensated for their tasks.[1631] Also, Shāfiʿī rejected the idea of the judge running additional businesses next to adjudication. This, he said, was even more distracting from dispensing justice, then speaking justice while in anger, which all schools considered particularly reprehensible.[1632]

In spite of his reluctance, al-Shāfiʿī seems to have acknowledged the practice of "rizq", lawful remuneration, rather than salary. He even recommended that caliph added to the rizq of the qāḍī a sum so that the judge can buy what he needs for writing.[1633]

Though the debate was kept alive for a very long time, judicial chronicles evidence throughout that almost all judiciary earned a salary for adjudication earned a salary for adjudication.[1634] Other jurists did not call the issue of salaries into question. In Khaṣṣāf's writings, or other Ḥanafī *adab al-qāḍī* writings, the making of business for a judge is not rejected.[1635] In his letter addressed to caliph al-Mahdī, ʿUbayd Allāh b. al-Ḥasan al-ʿAnbarī invited the caliph to pay the *qāḍīs*, without feeling the need to specify the nature of this *rizq*. [1636] In his Kitāb al-Kharāj, prominent Ḥanafī jurist Abū Yūsuf considered it normal to pay *qāḍīs*[1637], and it was also the opinion of Ḥanafī jurist al-Shaybānī in his book al-Jāmiʿ al-ṣaghīr.[1638] These jurists, all adhering to the Ḥanafī school which was dominantely represented in the judiciary, did not have the reluctance that Shāfiʿī had showed.

The *adab al-qāḍī* literature, predominantely concerned with the professional conduct of the judge not only considers the salary paid by the state treasury overwhelmingly a

[1631] Al-Shāfiʿī, *Kitāb al-Umm*, VI, p. 208. Tillier, *Les Cadis* (2009), p. 270.
[1632] Shāfiʿī, *Kitāb al-umm*, VI, p. 215. Schneider, *Das Bild des Richters* (1990), p. 69, pp.72-76 provides translation into German and further analysis.
[1633] Al-Shāfiʿī, *Kitāb al-umm*, VI, p. 215.
[1634] Well-off judges were at times not paid salaries, Wakīʿ, *Akhbār al-quḍāt*, I, p. 229; II, p. 11, p. 125, III; p. 7; Masud, "The Study of Wakīʿ's" (2008), p. 122. Depending on the political situation and the lack of stability in times of revolutions and turmoil, the Islamic state (or parts of the Islamic State) was not able to provide regular salary payments. See for example Escovitz, *The Office* of Qāḍī al-Quḍāt (1984) p. 211 on Mameluk rule in Egypt.
[1635] Khaṣṣāf, *Adab al-qāḍī*, sec. 111, p. 109 where it is stated that it is "permissable that the judge receives a sufficient payment [to sustain himself], payed by the treasury (*bayt al-māl*)". See also Schneider, *Das Bild des Richters* (1990), p. 74; Tillier, *Les Cadis* (2009), p. 270.
[1636] Wakīʿ, *Akhbār al-quḍāt*, II, p. 102.
[1637] Abū Yūsuf, *Kitāb al- Kharāj*, p. 187.
[1638] Al-Shaybānī, *al-Jāmiʿ al-Ṣaghīr*, p. 484.

prerequiste for proper adjudication. [1639] It also is discusses the secure salary as a way to safeguard the judge's position as neutral in society, representing the caliph and the caliphate. [1640]

Surely, the salary created a relationship of dependency between the receiving and the giving side, the receiving being obliged towards the giving.[1641] While the judiciary thus became an attractive position for the jurists, as it safeguarded a regular income, it also meant that a removal from office resulted in a severe financial loss. Removal from office could thus function as a strong sanction, working as a means to guarantee loyalty to the law, the caliph, and the State.

The financial independence for the professionalization of the adjudication was considered a serious matter. Wakīʿ even suggests to set up his own set of three vital qualifications for judges: a *qāḍī* does not accept bribes, cannot be humiliated, and cannot be tempted.[1642] He also recommends that *qāḍīs* be appointed from well-off and noble families.[1643]

In fact, judges who belonged to well-off families were documented for not having received salaries for their judgeship position.[1644]

The topic of salaries and additional jobs forms the transition to a problem that seems to have had greater urgency, namely corruption. In how far corruption challenges professionalization is yet another intriguing question. It is difficult to say if a rising state salary was also provided to counter the temptations and risks of corruption. Surely, the political authorities themselves were involved in cases of corrupting, or attempted to corrupt judges.[1645] Gifts and bonuses (money, estate or else) from political authorities

[1639] Schneider, *Das Bild des Richter* (1990), p. 74.
[1640] Schneider, *Das Bild des Richter* (1990), p. 74.
[1641] See also Tillier, *Les Cadis* (2009), p. 272.
[1642] Wakīʿ, *Akhbār al-quḍāt*, I, p. 7.
[1643] Wakīʿ, *Akhbār al-quḍāt*, I, p. 76; Masud, "The Study of Wakīʿ's" (2008), p. 122.
[1644] Wakīʿ, *Akhbār al-quḍāt*, I, p. 229; II, p. 11, p. 125, III; p. 7; Masud, "The Study of Wakīʿ's" (2008), p. 122.
[1645] Kindī, *Kitāb al-Wulāh*, p. 512. See the example of judge Bakkār in Egypt who was dismissed and imprisoned by governor Aḥmad Ibn Ṭulūn because he refused to damn croneprince al-Muwaffaq, as ordered by caliph am-Muʿtamid. Previously, Aḥmad b. Ṭulūn had honoured Bakkār a lot, rewarding him with 1000 dinār every year. When he grew angry with Bakkār he had requested his bonuses and gifts back. Bakkār agreed, saying that they have all remained untouched. And Bakkār returned to him 16 sealed bags.

have also played an ambiguous role, in part as a means of corruption, in part as a means to reward against the temptations of corruption.[1646]

Obviously, the regular mention of *de facto* corruption amongst the judiciary must have had negative impact on the authority of the judge. Throughout Islamic legal history, corruption of legal personae played a role, and at certain times legal personae seemed more open for bribery than at other times. The reasons have to be sought in the general political and economic climate. Surely, corruption negatively affected authority and recognition not only of the individually bribed but also of the professional reputation of the collective legal group. This was one main reason for the general theme in Islamic legal scholarship that the *qāḍī qua qāḍī* was not trusted as an agent of legitimate authority. The Islamic legal literature entails plenty of references to the precarious and dubious role of *qāḍīs* as agents of corrupted politics.[1647]
Judicial appointment, once accepted, was liable to minimize the personal authority of the jurist, and could expose him to suspicion – if not actual charges – of corruption and lack of integrity and trustworthiness. And if this the case, it was by virtue of the fact that, for the legally-minded, the government and "state" were routinely associated with corruption, coercion and temporal predilection. If the *qāḍī* lacked prestige in legal and moral authority, it is because of these associations with political circles.[1648]

Structurally speaking, however, the effect of salary and wealth on the creation and recognition of authority and independence proved important. The example of the Roman Magistrates and Senators shows that where the recognition for economic independence for the creation of authority was not given, authority faded away. Moral and political integrity could only be expected based on a basis of financial independence, or even wealth. Were these pre-conditions ceased to exist, the *auctoritas* of the Romans weakened.[1649]

[1646] Tillier, *Les Cadis* (2009), p. 471-475. Also on patronage and clientilism of judges at the Imperial Court, see Tillier, *Les Cadis* (2009), pp. 465-466.
[1647] See for example Hallaq, "Juristic Authority vs. State Power" (2003-2004), p. 249.
[1648] Hallaq, "Juristic Authority vs. State Power" (2003-2004), p. 249.
[1649] Eschenburg, *Über Autorität* (1976) p. 23; Rabe,"Autorität" (1992), p. 384 refering to the changing preconditions for senators and magistrates in the Roman Republic.

g. Autonomy from Public Authorities vs State-Driven Professionalization

Professionalization theories have strongly emphasized the need for autonomy, especially from the state for an occupation to transform into a profession. With professional autonomy, the collective and individual autonomy is meant, the freedom of professional design, in contents and practice.[1650] The emphasis on autonomy, especially autonomy from the state, is a predominantely Anglo-American feature.[1651] In fact, the more external involvement, the more likely it is that the interests of the professionals are infringed upon and interests of externals are realized instead.[1652] This is also way a high degree of professional autonomy, especially from the state, secures a comparatively high social standing, influence, and authority of the professional group in society.[1653]

The Abbasid case provides some examples for an autonomous judiciary in the professional sense. No external influence on what adjudication is to look like *in concreto* were made: no external influence on where adjudication had to take place, and how often and for how long court sessions had to take place. This is precisely why some complaints are documented about the slow handling of case at court[1654] and why it was up to the *adab al-qāḍī* literature (rather than the caliphate) to issue guidelines on how often to have court sessions.

Also, the very genre of the *adab al-qāḍī* literature is an example of the community of legal scholars autonomously, i.e. free from the state, providing a normative standard for a professional judiciary. In setting up the guidelines and recommendations, regarding the qualifications of the judiciary and the general outline of adjudication as practical occupation, the author-jurists were free to put down what to them was a sufficiently specialized and qualified judiciary.

In this sense, professionalization covers those processes that allow for a high degree of self-organization, including the freedom to the unusual design of the profession. [1655]

[1650] Hesse, *Berufe im Wandel* (1972) p. 72.
[1651] Past studies of the professions have focused on Britain and the United States, where the professions were largely autonomous vis-a-vis the state and where the old professions, especially law and medicine, reorganized themselves in response to expanding market opportunities and an entrepreneurially led pattern of industrialization and urbanization. See,e.g., Rüschemeyer, "Comparing Legal Professions" (1986), p. 417.
[1652] Hesse, *Berufe im Wandel* (1972), p. 130.
[1653] Hesse, *Berufe im Wandel* (1972), p. 130.
[1654] Wakī, Akhbār al-quḍāt, III, p. 267 on a case of a female litigant complaining about a judge who handled the case in a slow, and possibly negligent way, and was eventually removed because of this.
[1655] Hesse, *Berufe im Wandel* (1972), p. 133.

Examples of these can be found in a judge adjudicating while riding on a horse or on a market place. No state involvement was documented as to where to adjudicate, though the *adab al-qāḍī* would not consider these places appropriate.[1656]

This autonomy is made possible because it usually is accompanied by high competences in the incumbents and by high expectations of successfully realizing the profession. This is also why professionalization linked to high chances of prestige and influence. [1657]

And yet, having stressed the necessity of professional autonomy, also and precisely vis-à-vis the state authorities, it also has to be said that much of autonomy could only be realized through the state. In this regard, German professionalization theories differ from Anglo-American in that they acknowledge a larger role of the state, and recognize the court as a state-sponsored institution.[1658]

For the Abbasid case this means, no professional autonomy of the judge without the caliph.

With the caliph's monopoly over the appointment certificate, it was the state that granted protection against "lay" competition, or competition by other legal personae.[1659] It is the autonomy allowing the practitioner to make his own decisions without external pressure from the litigant parties or anyone who is outside his profession. The Abbasid *qāḍī* principally enjoyed independence from governors, state secretaries, nobility, postmasters and adversarial parties. He benefits from the autonomy to exclude the un-appointed and to provide for the legal right to practice.

Without the caliphs, the models of professional autonomy remain incomplete: The caliphs provided for the monopoly of caliphal appointment and removal from office, and secured adjudication through monthly salaries. Caliphal, state-driven professionalization is both characterized by the leading role of the state in creating new jurisdictions and by the specific position of the caliph and the state as legitimating instance. The place of the Abbasid state in the regulation of a professional judiciary was prominent. The caliphs

[1656] On the court as bureau (space of adjudication), see Chapter Four, I.3. b.bb on.
[1657] Hesse, *Berufe im Wandel* (1972), p. 131.
[1658] Rüschemeyer, "Comparing Legal Professions" (1986), p. 426. On neglecting the state in the studies of professions, and its affect on comparative studies, see Rüschemeyer, "Comparing Legal Professions" (1986), p. 416. See the comparative examples of the professions in England and the USA who have historically been more independent from the state than German academics, see Rüschemeyer, "Professionalisierung" (1980), p. 317.
[1659] More generally, Rüschemeyer, "Comparing Legal Professions" (1986), p. 444.

were particularly involved in these attempts to promote the profession of the judiciary (and the profession of legal scholars to develop the legal discipline that underlies it).
Thus, the judge – and his authority – ultimately needed to rely on recognition and guarantees by the state.[1660]

Significantly, the state guaranteed the judiciary's authority to use coercion, to enforce their decisions. The fact that the state offers the coercive power of its monopoly as a means of settlement of certain kinds of disputes is in itself a noteworthy social phenomenon. [1661] Comparatively speaking, almost all states sponsoring adjudication seek to exercise some control over the specialists involved in adjudication, be it through the administrative apparatus or through the organization of the courts. This tends to set "officers of the court" apart from other occupations.[1662] Definitions of legal work and legal occupations are therefore almost always hinged on the state, its structure and its activities.[1663]

Professionalization and authority of the judiciary thus needed to rely to a certain extent on the structure the State provided. This structure allowed the creation and recognition of judicial authority on the one hand, yet it also allowed the judiciary to be associated with a state that at times only seeks to serve its own interests, such as the maintaince of power and stability. At the same time, both judiciary and the state benefited from leaving the overwhelming majority of judicial practice left to judicial practice and scholarly advice. This way, a judicial autonomy could be established that allowed for a steady judicial professionalization and authority.

h. Conclusion: Authority through Professionalization

The professionalization of the judiciary emerged hand-in-hand with an increase in teaching and writing about the law, as happened in the early learning circles of the late 8th/ early 9th centry.[1664] This also enabled a self-reflection about the role of those

[1660] Rüschemeyer, "Comparing Legal Professions" (1986), p. 444.
[1661] Rüschemeyer, "Comparing Legal Professions" (1986), p. 426.
[1662] Rüschemeyer, "Comparing Legal Professions" (1986), p. 426.
[1663] Rüschemeyer, "Comparing Legal Professions" (1986), pp. 428, 435.
[1664] See Johansen, "Wahrheit und Geltungsanspruch" (1997), p. 991.

administrating the law and writings about the professionalizing self in the *adab al-qāḍī* literature.

Also, professionalization of the judiciary was a strong feature of Abbasid judicial policy. State involvement was therefore significant for the development of the judiciary. Until now, many have thought that professionalization needed to differentiate itself from the historical matrix of religion[1665] and in distinction from the state, but the Abbasid examle shows that the strive to Islamicize the judicial occupation by the Abbasid caliphate has majorly contributed to a professionalization of the judiciary. Professional authority of the judge rested both on autonomy from other authorities, political or legal, as well as on the support by the caliph.

Professionalization enhances authority in many ways: It increases the chance to financially secure one's living, and provides chances to act autonomously and in a way as to provide for the acknowledgment of others, giving professionals a way to control their social relations with others. [1666] The aims of professionalization, in short, thus are income generation, prestige and authority.[1667] This holds true also for the Abbasid judiciary, whose rise as the delegate of the caliph in particular provided them with substantial standing in society.

But how do the professionalization of the judiciary and the principle of judicial consultation relate to each other? Can the judiciary be considered professional, or professionalized, if simultaneously there is a need for the judiciary to ask for advice, instead of deliberating and deciding themselves without external assistance? Does it make a difference if advice is sought from the same overarching community of legal scholars, i.e. the same legal and, in part, social group, rather than a non-legal professional group?

Muslim jurists like Khaṣṣāf and Shāfiʿī engaged in normative works would probably argue that the principle and necessity to ask for advice demonstrates a high degree of acknowledgment for the complexities of the law.[1668] And they would highlight the

[1665] Parsons, "Professions" (1968), p. 537 ; Luhmann, *Ausdifferenzierung des Rechts* (1981), pp. 35-52.

[1666] Hesse, "Der Einzelne und sein Beruf: Die Auslegung des Art. 12 Abs.1 GG durch das Bundesverfassungsgericht" (1970), pp. 449-474; Hesse, *Berufe im Wandel* (1972), p. 69.

[1667] Professionalization has been generally looked at quite positively, if not in an idealized way, Rueschemeyer, "Comparing Legal Professions" (1986), p. 429. On this critique see also Parsons, "A Sociologist looks at the Legal Profession", particularly p. 371. Generally stressing the positive criteria of profession and conceding that little research done so far on the negative aspects of profession see Hesse, *Berufe im Wandel* (1972) p. 54, footnote 51.

[1668] Khaṣṣāf and Shāfiʿī on uncertainty in law, Chapter Two, V. 2.b.

autonomy of the judge in dealing with the advice, maintaing that the judge is not making himself dependable on the jurisconsult's advice. Muslim jurists and historians, like Wakīʿ and Kindī, who witnessed the judge's multi-layered relationships to the jurisconsult in legal history and the jurisconsult's persuasive and quasi-coercive authority would probably concede that the judge, though increasingly professionalizing in many elements, had to reckon with jurisconsult who could guide and constrain the judge's decision-making in many ways. Consultation as a principle does not inherently exclude professionalization but rather emphasize that legal professional personae collaborate in the field of law-making.

Professional(ized) authority is often accompanied by further organizational aspects of authority, and judicial bureaucratization is such a field that lends itself to the Abbasid judiciary.

3. Judicial Bureaucratization

In the Weberian sense bureaucratization is an organizational arrangement that allows for differentiation, a division or labor, and the rationalization of working processes.[1669] Bureaucratization works both to "advance the development of more complex and differentiated legal institutions and activities" and to reduce autonomy of the individual and the institution (which is particularly relevant when discussing the scholars' organizational authority that works without a noticeable bureaucracy).[1670]

The task of settling legal disputes, for example, needed "administrative efficiency" that could no longer tolerate *ad hoc* steps.[1671] Thus, a bureaucratized apparatus routinized and rationalized some tasks, so that the officials no longer needed to make working decision every time anew. In fact, this "reiterative authority"[1672] is the familiar regime of habit, where through repetition of a series of processes (producing documents and filing being central to these), the bureaucracy establishes its authority. Similarly to professionalization, bureaucratization means that by way of formulating procedural rules

[1669] Weber, *Wirtschaft und Gesellschaft* (1980), pp.560-562. Baer, *Rechtssoziologie* (2011), p. 124 refers to a critique of bureaucracy today.

[1670] On bureaucracy as a response to complexity in administration, Weber, *Wirtschaft und Gesellschaft* (1980), p. 560; Eisenstadt, *The Political System of Empires* (1963), pp.137-38, Baer, *Rechtssoziologie* (2011), p. 125. On the scholar's non-bureaucratized authority, see below, Chapter Four, III.3.

[1671] Similarly, Coulson, *A History of Islamic Law* (1964), p. 28.

[1672] Feldman, *Governing Gaza. Bureaucracy, Authority and the Work of Rule* (2008), p. 14-20 on "reiterative authority". Feldman uses "reiterative authority" to show how the authority of writing produces the authority of bureaucracy.

and working method, seeking to secure a professional commitment and principles of standard, ultimately creating legitimacy.[1673]
In the following, elements of bureaucratization shall be applied to the Abbasid case to analyse the judiciary as a bureaucratic apparatus. Does the Abbasid example provide sufficient evidence for a judicial bureaucratization to shape the authority of the judge?

Western theories largely addressed bureaucratization as the advent of the bureaucratic state of the Enlightenment in the eighteenth century of continental Europe[1674] and as the working modus of the modern state.[1675] However, bureaucratization in Islamic political history is a well-known subject.[1676] The Islamic use of bureaucratic rather than personal administration to govern had already begun under the Umayyads (r. 41-132/661-750) and possibly even earlier, but despite the recurrent nepotism and corruption among state officials, the Abbasids can be said to have brought bureaucratic administration to a new level of regularity, familiarity and even independence within society.[1677] A bureaucratization of the judiciary would thus fit into a time of overarching bureaucratization tendencies.
But in what way was the Abbasid judiciary bureaucratized? Did bureaucratization create formal and systematized legal rules, leading to a "maturing" of the judiciary? [1678] What was the effect of bureaucratization on the authority of the judiciary? How did bureaucratic regulations of law affect the possibilities of judicial consultation, did bureaucratization of the judiciary stifle the possibilities for judicial consultation?

Five constitutive elements of bureaucratization, going back to the seminal work of *Max Weber* are applied to examine the status of the Abbasid judicial bureaucratization: 1) The principle of fixed and official jurisdictional areas which are generally ordered by higher political authorities through laws or administrative regulations; 2) regular activities as

[1673] Bürokratisierung as "mit Hilfe von Verfahrensordungen und Arbeitsmethoden werden die einzelnen Konstruktionsvorgänge organisiert und ihnen zugleich Verbindlichkeit und Vorbildlichkeit („Legitimität") zu sichern gesucht", Hesse, *Berufe im Wandel* (1972), p. 125.
[1674] Ranieri, "Vom Stand zum Beruf" (1985), pp. 83-105, Rueschemeyer, "Comparing Legal Professions" (1986), p. 438.
[1675] Baer, *Rechtssoziologie* (2011), p. 123.
[1676] For a recent treatment of administrative bureaucracy in Islamic history, see Heck, *The Construction of Knowledge in Islamic Civilization* (2002), p. 60-79.
[1677] Heck, "Law in ʿAbbasid Political Thought" (2004), p. 86. Administrative bureaucracy rose to a high level under Abbasid government secretaries (*kuttāb*), the Barmakids, under the reign of caliph al-Mahdī, Kennedy, *The Early Abbasid Caliphate* (1981), p. 101, 117.
[1678] On the relationship of bureaucratization and the legal professionals see, Rueschemeyer, "The Legal Profession" (1977), p. 107.

official duties required for the purposes of the bureaucratically governed structure, 3) office hierarchy and levels of graded authority as a firmly ordered system of super- and subordination in which there is a supervision of the lower offices by the higher ones; 4) bureaucracy is based upon written documents ('the files') which are preserved. There is, therefore, a staff of subaltern officials and scribes. The body of officials actively engaged in a 'public' office, along with the respective apparatus of material and the files, make up a 'bureau'; and 5) official activity demands the full working capacity of the official.[1679] Whether the judge could establish himself as a bureaucratic authority rests on whether these elements were part of the judicial apparatus he belonged to.

a. Fixed and Official Jurisdictional Areas

Just like any other bureaucratization, the judicial bureaucracy called for a principle of fixed and official jurisdictional areas, which are generally ordered by higher political authorities through laws or administrative regulations.[1680] Also, the jurisdictional areas need to be of a permanent and public character, known to the population in need of the services provided. The authority over these jurisdictions needs to be precisely determined and structural, rather than temporily called into being for each case.[1681] Abbasid jurisdictions were provided for as local and subject-matter jurisdictions.

aa. Local Jurisdiction

The local jurisdiction of adjudication was typically included in the certificate of appointment, indicating a city or region.[1682] With the late third/ninth century, appointments were increasingly read out in the mosque, the place of communality.[1683]

[1679] Weber, *Wirtschaft und Gesellschaft* (1980), pp. 126-130; pp. 551-552; pp. 553-579.
[1680] Weber, *Wirtschaft und Gesellschaft* (1980), pp. 551-552, pp. 563-566 where Weber refers to Kadi-Justiz as the opposite of a legally regulated office.
[1681] Weber, *Wirtschaft und Gesellschaft* (1980), p. 563.
[1682] See, for example the judicial appointment certificate as entailed in Ṭanūkhī, *Nishwār al-Muḥādarah*, as translated by Margoliouth, *The Table-Talk of a Mesopotamian Judge* (1921-1922), p. 234. Schneider, *Das Bild des Richters* (1990), p. 174-198 compares appointment certificates of different Islamic periods. Whether an appointment was made to a city or region probably depended on its size and degree of urbanization.
[1683] See the examples of *qāḍī* Hārūn b. Ibrahīm in 313/925, Kindī, *Kitāb al-Wulāh*, p. 482; *qāḍī* Aḥmad b. ʿAbdallāh b. Qutayba in 321/ 934, Kindī, *Kitāb al-Wulāh*, p. 485; and ʿAbdallāh b. Aḥmad b. Suʿayb in 329/941, Kindī, *Kitāb al-Wulāh*, p. 489. On the reading out of appointment certificates see Schneider, *Das Bild des Richters* (1990), p. 30. See this Chapter Four, I.2.d. on the caliphal monopoly over appointments (at least in regions that were firmly under caliphal control).

Jurisdiction of a judge was thus made transparent from the beginning of the judge's employment.

The fact that the local jurisdiction was made known to public is also evidenced by the fact that the judicial chronicles mention the local jurisdiction for every judge appointed. Local jurisdictions seem to have been stable, and not modified from judge to judge. Judicial chronicles report that succeeding judges took over the same jurisdiction of their predecessors. Abbasid jurisdiction, just as adjudication in general, is documented only for the large cities and regions, corresponding with a steady urbanization within the Abbasid Empire.[1684]

Since documentation on legal administration was focused mostly on the major urban centers, we have little information about the little urbanized regions and provinces.[1685] We know though that *qāḍīs* either appointed deputies (*khalīfa* or *nā'ib*) who heard cases in the major villages surrounding the metropolis or judges themselves travelled to the villages to hear disputes, as documented in the case of Khurasan's judge ʿAbd Allah b. Burayda.[1686] The judicial powers delegated to the deputies were frequently limited in both local and subject-matter jurisdiction. Some deputy-judges, of which we generally know less than about the judges, were given powers to hear certain types of disputes, while others had full jurisdiction but were limited in territorial terms. Thus, some deputies were charged with administering criminal justice (*masā'il al-dimā'*)[1687], while others were entrusted with settling estates.[1688]

Within one city or region, there was only one jurisdiction, i.e. a city or region was under the adjudication by one judge only. A prominent exception to this rule was the city of Baghdad who, due to its size and importance as a capital had two judges: Caliph al-Hādi (r. 169-169/785-786) divided the jurisdiction of the city into two and provided two judges, one for the Eastern side and one for the Western side of the river Tigris of Baghdad.[1689]

[1684] On urbanization during the early Abbasid reign, see Kennedy, *The Early Abbasid Caliphate* (1981), p.41. On the link between urbanization and professsionalization, see Rüschemeyer, "Comparing Legal Professions" (1986), p. 417.

[1685] On the spatial divide of center-provice-periphery and its effect on the law, and its documentation, See Chapter One, I.3.b.

[1686] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 306.

[1687] On the fact that criminal aspects were usually not within the jurisdiction of the *qāḍi* but rather the police court, see above Chapter Four,I.2.a.bb (specialization of the judiciary with respect to other legal personae).

[1688] Hallaq, *Origins* (2005), p. 80.

[1689] Wakīʿ, *Akhbār al-quḍāt*, III, p. 254. Caliph al-Hāḍī appointed judge Aḥmad b. ʿIsā al-Burnī to the East side and Ismaʿīl b. Isḥāq to the West. But when Burni was dispatched to adjudicate disputes in Nahrawān,

A different example tells us of two judges appointed by caliph al-Mahdī to sit in one mosque but each with his own jurisdiction within the Baghdadian district of ʿAskar al-Mahdī around 161/777-78, shows that though they adjudicated in the same mosque, each judge held his sessions in one end of the mosque.[1690] It is not documented how long their dual judicature lasted and we do not know of neither a dispute between the judges, or a fall out over a judgment. Each judge remained master of his own judgments in his jurisdiction.

Local jurisdiction remained stable and aided in perpetuating the judge's authority within the judicial apparatus.

bb. Single qāḍī court

Courts were ordinarily constituted as single *qāḍī* courts. In the *adab al-qāḍī* work of the Iraqi jurist Khaṣṣāf the number of judges in one court was not addressed, while his commentator Jaṣṣāṣ writing in the fifth/tenth century explains that one does hardly find two judges in one city, but that one judge was the general rule.[1691] For the overwhelming part of Islamic legal history, the single judge principle was the rule.[1692] However, Wakīʿ noted an important exception to this rule where a court, four years into Abbasid reign, consisted of more than one *qāḍī*. This exception is important in that it tells us what the non-existence of an institutionalized bench of judges could have to do with the role of the jurisconsult in adjudication: The applied principle of "no bench" could explain why and how the jurisconsult fulfilled the function of someone the judge could consult his cases with. In 137/754 two *qāḍis*, ʿUmar b. ʿĀmir al-Sulamī and Sawwār b. ʿAbd Allah, both functioned as judges of the same jurisdiction of Basra at the same time.[1693] However, when there was a conflict over how to judge a defect in a sales contract, the two had diverging legal opinions and could not come to an agreement. This lead to judge

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Ismaʿīl was left in charge of the jurisdiction of the entire city until his death. Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 254, pp. 281–82. Later, however, Baghdad was again split into the two jurisdictions, each with a different judge, until 301/913, when the jurisdiction of the entire city was unified under Muḥammad b. Yusuf, Wakīʿ, *Akhbār al-quḍāt*, III, p. 282; Hallaq, *Origins* (2005), p. 81.However, Tillier, *Les Cadis* (2009), p. 338 argues that Baghdad had a multiple jurisdiction during the whole period of early Abbasid rule.

[1690] Wakīʿ, *Akhbār al-quḍāt*, III, p. 251.

[1691] Jaṣṣāṣ in Khaṣṣāf, *Adab al-qāḍī*, sec. 480, p. 414; Tillier, *Les Cadis* (2009), p. 281.

[1692] We know of very few cases of judicial benches during later periods, one exception occurred in Damascus under Mameluk rule, Tyan, *Histoir de l'organisation judiciaire* (1960), p. 212-213; Hallaq, *Origins* (2005), p. 82; Tillier, *Les Cadis* (2009), p. 280. On the bench and its effect on adjudication, see also Chapter Two, V.2.

[1693] Wakīʿ, *Akhbār al-quḍāt*, II, p. 35; Masud, "The Study of Wakīʿ's" (2008), p. 121.

Sawwār being removed from office by the governor, leaving al-Sulāmī the remaining single judge.[1694]

It is likely that *qāḍī* al-Sulāmi who remained in office was a scholar of Basra.[1695] Yet, we do not know if the governor who made him remain in office and dismissed his co-judge Sawwār preferred al-Sulāmi's legal reasoning, his adherence to the city of Basra, or whether other reasons motivated the governor to dismiss one and keep the other. We do not know what made the governor opt for two judges in one jurisdiction in the first place, and whether the two judges had similar or divergent competences.[1696] Were the two judges meant to mutually control each or was divergence thought to allow for compromise and intermediate solutions, maybe intended to unify the law through adjudication? Or was it hoped that internal judicial consultation, i.e. between judges, would help to create deliberations necessary for well-considered judgments? The removal of Sawwār shows, however, that these two judges failed to produce a unanimous adjudication, and instead created an "institutional blockade"[1697] through dissens.

The two-judge bench was an experiment that was not repeated during the Abbasid era, not even with an unequal number of judges which would have enabled a majority-based decision. The lack of a judicial bench, possibly, was a reason for the continuous role of the jurisconsult in adjudication. Deliberation with the judge was thus possible, but the persuasive authority of the jurisconsult would not infringe on the autonomy, right and duty of the judge to have the (formal) final say in adjudication: Chapter Two demonstrated that the jurisconsult normatively was to help navigate through the law but not to decide the law (unless, according to Shāfiʿī, there was the danger of the judge violating or substituting binding law).
Differently put, there was no need for a bench when judicial consultation with a jurisconsult was a principle recommended, accepted and applied. Economically speaking, it was less expensive for the Abbasids to have one judge on the payroll, instead of two or more. In terms of responsibility, there is only one judge who in the end could and had to make a judicial decision. Despite the fact that no bench existed, there was

[1694] Wakīʿ, *Akhbār al-quḍat*, II, p. 55
[1695] Tillier, *Les Cadis* (2009), p. 282.
[1696] Tillier, *Les Cadis* (2009), p. 282.
[1697] Tillier, *Les Cadis* (2009), p. 282.

someone to play the part of a monitoring, controlling discussion partner, without being officially appointed: the jurisconsult.

One of the distinguishing characteristics of the Islamic court in the long term remained its single-judge constitution.[1698] The judicial bench did not establish itself in the Arab-Muslim world. The uniqueness of the *qāḍī* has have been a reaction to the practicalities: if the experiences of a bench were abandoned by the Abbasids it was probably because it did not correspond to the judicial system in place, of which the unified judgment must have been one.[1699]

cc. Subject-Matter Jurisdiction

Jurisdiction regarding the subject-matter appeared as fluid during the very early Abbasid reign, and became increasingly fixed. The subject-matter jurisdiction of the *qāḍī* court evolved in parallel to the specialization of the judiciary as a profession, demonstrated above part I, 2. Initially, there was a general subject-matter jurisdiction, like the example of Abū Yūsuf Yaʿqūb b. Ibrahīm (d. 182/798) illustrates. He was *qāḍī* of the Western side of Baghdad under the reign of caliph Mūsa al-Hādī and judged on all judicial matters (*yaqḍī fi kul shay'*), comprising private as well as criminal law.[1700] However, around the same time, judge ʿUmar b. Ḥabīb, *qāḍī* of the Eastern side in Baghdad judged on thefts (*yaqḍī bil sarika*) only. [1701]

Gradually, the *qāḍī's* court came to have jurisdiction over what came to be known as private law only: family law, inheritance, civil transactions and injuries, torts, and endowments.[1702] Criminal jurisdiction was not part of the *qāḍī's* court but largely of the police court (*shurṭa*).[1703] The subject-matter jurisdiction focused on private law is also evidenced by the casuistry in the *adab al-qāḍī* literature that refers to illustrative and

[1698] Hallaq, *Origins* (2005), p. 82.
[1699] Tillier, *Les Cadis* (2009), p. 285.
[1700] Wakīʿ, *Akhbār al-quḍāt*, III, p. 255.
[1701] Wakīʿ, *Akhbār al-quḍāt*, III, p. 255.
[1702] Coulson, *A History of Islamic Law* (1964), p. 132. See also Khaṣṣāf's *adab al-qāḍī* work covering mostly "private" law questions of law, Chapter Two, IV. 2. (adab genre), Chapter Three, II. 5 (private law conflicts), Chapter Four, I.2.a.aa. (1) (litigation as judicial task).
[1703] Criminal law (*ʿuqubāt*) was early on excluded from the *qāḍī's* jurisdiction, Johansen, "Zum Prozeßrecht der ʿuqubāt" (1977), p. 477. See also the specialization of the *qāḍī* court as distinguished from the police court, Chapter Four, I.2.a.bb.

pedagogical private law cases, as well as the judicial chronicles by Wakīʿ and al-Kindī that show a strong concern for legal cases on commercial matters.[1704]

The subject-matter jurisdiction of the *qāḍī's* court jurisdiction was defined, at least in part, in distinction from other legal-judicial actors, as the section on the specialization of the *qāḍī's* profession showed.[1705] Fixed and official jurisdiction was an increasing phenomenon of the Abbasid judiciary. Local and subject-matter jurisdictions were sufficiently established to provide for a transparent structure. This structure increasingly strengthened the jurisdictional order regardless of the individual judge.

a. Adjudication as Official Duty: Regular Activities in a Bureaucratically Governed Structure

Bureaucratization demands regular activities as official duties. These duties are a central aspect of a bureaucratically governed structure. Regularity is an important bureaucratic quality because, particularly in the application and adjudication of the law, can minimize the space for arbitrariness. [1706] Regularity can create transparency, accessibility and accountability, and thereby add to adjudicative authority within a bureaucratically established structure.[1707] Two aspects of regularity are disussed here, regularity regarding the times of adjudication as well as of the space of adjudication.

aa. Times of Adjudication

The times of adjudication were, despite the granted professional and organizational autonomy of the judge, not completely left untouched by the *adab al-qāḍī* literature.

The judge was in principle free to hold court sessions as often as he saw fit. *Qāḍīs* probably did not hold court every day, at least we know that judge Abū Khuzayma in Egypt to have taken less salary on the day he instead of adjudicating washed his clothes,

[1704] On litigation largely related to commercial matters, see Chapter Four, I.2.a.aa. (1)
[1705] On Specialization in dinstinction to other judicial actors, see this Chapter Four I.2.a.bb.
[1706] Baer, *Rechtssoziologie* (2011), p. 125.
[1707] On bureaucracy and the benefit of accountability, Weber, *Wirtschaft und Gesellschaft* (1980), p. 562-563.

went to a funeral, or engaged in his additional business. [1708] Some judges held court sessions "only twice a week". [1709]

As for court holidays, Khaṣṣāf mentions that during the time of Abū Ḥanīfa (d. 150/767), Saturday was prescribed as a court holiday, while during al-Khaṣṣāf's time, either Monday or Tuesday was prescribed off, and it was for the *qāḍī* to ascertain which of these days was to be observed.[1710] Religious holidays as well as Fridays were also observed.[1711] Court sessions were thus held rather regularly, probably several times a week.

Khaṣṣāf even made recommendations for the court hours during the day. For instance, he did not approve of the administration of justice in the early morning and in darkness.[1712] Especially where mosques were used as seats of justice, the timing of obligatory prayer was of help when fixing the working hours of the court. There would be a break for the midday prayer (*ẓuhr*), perhaps also serving as a lunch break. Then there was another break for the late afternoon (*'aṣr*) prayer, and either the afternoon (*'aṣr)* or the sunset (*maghrib*) prayers suspended the business of the court for the day.[1713]

The timing of adjudication and its regularity was thus a concern dealt with in a way that was probably familiar for the general public. It thereby was made sure that regular service hours of adjudication served those seeking justice. Also, the regularity of the court hours helped to structure the profession and office of the judge.

bb. Spaces of Adjudication

Much more controversy sparked the question of the location of adjudication. The space of adjudication, and thereby spatial authority ascribed to the judge, is crucial for the visual impression of adjudication and the judge. In fact, the actual place of the bureau, or desk, emerged as a key marker for the theory of bureaucratization.[1714]

[1708] Al-Kindī, *Kitāb al-Wulāh*, p. 363.
[1709] Ṭanūkhī, *Nishwār al-Muḥādarah*, as translated by Margoliouth, *The Table-Talk of a Mesopotamian Judge* (1921-1922), p. 209.
[1710] Khaṣṣāf, *Adab al-qāḍī*, I, p. 63, Surty "The Ethical Code" (2003), p. 156.
[1711] The days of *'Īd al-Fiṭr* celebrating the end of the month of Ramadan and *'Īd al-Aḍḥā*, commemorating Abraham's willingness to sacrifice his son for God as well as the day of *'Arafāt* (ninth day of the month Dhū'l-Ḥijja), Khaṣṣāf, *Adab al-qāḍī*, p.63.
[1712] Khaṣṣāf, *Adab al-qāḍī*, I, pp. 47-66, Surty "The Ethical Code" (2003), p. 156.
[1713] Khaṣṣāf, *Adab al-qāḍī*, p.63; Surty, "The Ethical Code" (2003), p. 156.
[1714] On the bureau as the origine of the theory of bureaucratization, Baer, *Rechtssoziologie* (2011), p. 126.

Weberian discussions focused on the separation of the bureau from the private domicile of the official, following the idea that bureaucracy segregates the official activity as something distinct from the sphere of privat life.[1715] *Weber* hoped that the distinction between privat and public would add to the rationality of the working modus, and that it would reduce arbitrariness and partiality, and de-personalize (judicial) administration.

Muslim jurists, however, rather examined the question whether the sacredness of the mosque was suitable for adjudication, or whether instead his home or a third place should be considered as more appropriate. During most of Islamic legal history, there was no court-building, court-house or court-room, i.e. any specifically segregated and specified space for adjudication.[1716] This is why rather than "court", the notion of "court session" (*majlis al-ḥukm or majlis al-qaḍā'*) is more precise in capturing the activity of adjudication rather than the place of it. Literally, *majlis* means a place where one sits. *Majlis al-qaḍā'* means the place where the activity of the adjudication (*qaḍā'*), whose agent is the *qāḍī*, occurs.[1717]

Starting point of the scholarly debate is the home of the arbitrator (*ḥakam*) which was probably the early place of dispensing justice from befor the coming of Islam.[1718] People would *ad hoc* seek the arbitrator in his home when a problem occurred rather than turning to a state appointed judge with fixed court session hours.[1719] Given that the arbitratror still applied laws after the coming of Islam and next to the *qāḍī*, the tradition of seeking justice at someone's home was still prevalent. In fact, homes played an equally important role in both adjudication and teaching.[1720] Houses of well-to-do people in Baghdad were divided into a family portion (*ḥaram*) and the sitting-room in which to receive the (mainly male) public.[1721] Similarly to the teaching activities, adjudication at the home of the judge could and would take place in their homes.[1722] It is

[1715] Weber, *Wirtschaft und Gesellschaft* (1980), p. 552.
[1716] Hallaq, "A Qaḍī's Diwan" (1998), p. 418.
[1717] Hallaq, *Origins* (2005), p. 59.
[1718] Schneider, *Das Bild des Richters* (1990), p. 59 considers the first place of adjudication the home, and then the mosque, while Tyan, *Histoire de l'organisation judiciare*, (1960), p. 275 thinks that from the beginning of Islam, the mosque right away was the place of adjudication.
[1719] Schneider, *Das Bild des Richters* (1990), p. 59.
[1720] Educational activities were often pursued at homes of scholars, see Ahmed, *Muslim Education* (1968), pp. 135-140 serving also as place of *muftī* activities (*futya*).
[1721] See Ahmed, *Muslim Education* (1968), p. 136.
[1722] Wakīʿ, *Akhbār al-quḍāt*, I, p. 275; According to Wakīʿ, *Akhbār al-quḍāt*, II, p. 316 Qāḍī Shurayḥ held sessions at home when the weather was cold, when it was warm he sat in the mosque. Kindī, *Kitāb al-*

also known that adjudication took place at their homes' doorsteps.[1723] Both sites, in and in front of the judge's house, were presumably open to the litigants and the interested public at all regular day times.

The mosque was a much more often mentioned place for adjudication. From the days of the Prophet, mosques (sing. *masjid*) have played an important role as public space in Muslim societies.[1724] The mosque had been functioning as a community-house, serving as a place for worship, educational purposes and for the gathering of scholars as well as for the *qāḍīs'* sessions of adjudication (sing. *majlis*).[1725] According to Wakīʿ, most of the judges used mosques as courts for adjudication.[1726] Judges would be sitting in a part of the mosque, usually on a prayer rug.[1727] As a third place that was neither home nor mosque, judges have made judicial decisions in the marketplace[1728], and even on the roadside.[1729]

The juristic debate about the right locality for adjudication was mainly held between Ḥanafīs, Mālikīs, and Ḥanbalīs on the one hand, who argued for the mosque as a place of adjudication, and Shāfiʿī on the other, who was against adjudication in the mosque.[1730] For the former, the mosque was seen as the preferable place of adjudication, especially for the Ḥanafīs.[1731] The chief mosque was the place of assembly par excellence, accessible to all and thus guaranteeing public presence. The places of adjudication were also accessible for non-Muslims: Christians, for example, could enter the mosque for litigation; previously, the judges had reserved a day for them in their homes. [1732] As for

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Wulāh, p. 428. The judge started adjudicating at home after the rug he used to hold his court sessions on in the mosque was thrown out by the people.
[1723] Wakīʿ, *Akhbār al-quḍāt*, III, p. 307.
[1724] For an overview see Hillenbrand, "Masdjid. I. In the central Islamic lands", Encyclopedia of Islam (2).
[1725] On mosques as educational institutions see e.g. Ahmed, *Muslim Education* (1968), pp. 115-134 who lists 57 mosques in Baghdad during the early and mid-Abbasid period, their precise locations, their local or widely traveled scholars from far-off who used to teach in each mosque, and- in cases documented- the subject- matters that were taught.
[1726] Wakīʿ, *Akhbār al-quḍāt*, I, p. 145, 162; II, p. 22, p. 125, 303, 316, 427, 428; III, 28, 36, 69, 135, 168, 250, 251, 283, 306; al-Kindī, *Kitāb al-Wulāh*, pp. 378, 443-444. Schneider, *Das Bild des Richters* (1990), p. 56; Masūd, "The Study of Wakīʿ's" (2008), p. 122.
[1727] On the precise location of the judge's session in the mosque, see for example above, al-Kindī, *Kitāb al-Wulāh,* p. 375, see Chapter Four, I.3.b.bb. on spatial aspects of adjudication.
[1728] Wakīʿ, *Akhbār al-quḍāt*, I, p. 399; III, p. 206; Masud, "The Study of Wakīʿ's" (2008), p. 122.
[1729] Wakīʿ, *Akhbār al-quḍāt*, I, p. 333; Masud, "The Study of Wakīʿ's" (2008), p. 122.
[1730] Schneider*, Das Bild des Richters* (1990), pp. 56-57.
[1731] Khaṣṣāf, *Adab al-qāḍī*, sec. 79-80, pp. 84-86.
[1732] On the accessibility of mosques to Christians, see also Chapter Three, I.2.b.bb. (introduced by *qādī* Masrūq al-Kindī as innovation).

women, no legal restrictions on the appearance before a judge existed. The regular appearance of female litigants before the court seems to confirm this rule.[1733] However, some prevailing social norms discouraged some women from appearing in court.[1734] Also, non-Arabic (some of them possibly foreign and non-Muslim) speaking litigants would be provided with an interpreter to allow them to seek justice before a *qāḍī*.[1735]

Shāfiʿī takes a different stand.[1736] He recommends the judge (*uḥibbu lil-qāḍī*) that he adjudicates at a location accessible to all. He initially neither mentions the mosque nor the judge's home but stresses that the judge's court session should be held in the middle of the city. But then Shāfiʿī becomes more specific and advises the judge not dispense justice in the mosque, too many people would be coming for reasons other than what the mosques were built for. The judge should speak justice at an appropriate and comfortable place where the judge would not get quickly tired. Shāfiʿī adds that while he considers adjudication in the mosque to be repugnant (*makrūh*), he regards the execution of the *ḥadd* punishment (largely corporal punishments) in the mosque as even more repugnant. For Shāfiʿī, this practice went against the sanctity of the mosque, which was a reason for Shāfiʿī to discourage the use of mosque premises as courts.

Thus, parallel to the discusssion of the question of the right locality for adjudication, the question of the right locality for punishment, especially the *ḥadd* punishment involving corporale sentences occurred. In fact, the execution of these punishments proved to be a particular sensitive issue, causing for example divergence between judge Bishr and the jurisconsults and his trial in the court of complaints (*maẓālim*), demonstrated in Chapter Three.[1737] However, it seems that the execution of the punishment in the mosque was practiced, as many cases demonstrate. [1738]

[1733] Female litigants, some even with a demanding manner, it seems, were mentioned regularly in the judicial chronicles. For an overview of the cases they brought to court as litigants, see the table in Tillier, "Women before the Qāḍī" (2009), pp. 292-293. Their demanding manner might well be indicative about their social class.

[1734] Tillier, "Women before the Qāḍī", (2009), p. 281, 297-300. Ritually, they were not expected to enter mosques when they were menstruating. On ritual and social conventions establishing obstacles for women entering mosques, see Reinhart, "When Women Went to Mosques" (1996), pp.116-127, Melchert, "Whether to Keep Women out of the Mosque" (2006), pp. 59-70.

[1735] See interpretors as court staff, Chapter Four, p.x.

[1736] Shāfiʿī, *Kitāb al-umm*, VI, pp. 214-215.

[1737] On executing the *ḥadd* crime in the case of judge Bishr, see Chapter Three, I. 4. c.

[1738] See for example, q*āḍī* Saʿīd b. Ibrahīm is only one judge documented who executed punishment in the mosque, Wakīʿ, *Akhbār al-quḍāt*, I, p. 162; Masud, "The Study of Wakīʿ's" (2008), p. 122. See also judge Ibn Abī Layla ordering the execution of the *ḥadd* punishment in the mosque, Wakīʿ, *Akhbār al-quḍāt*, III,

While Shāfiʿī was against the mosque as place of adjudication as a widespread practice, it remains unclear if Shāfiʿī prefers the judge's home or a third, neutral venue. Shāfiʿī instead stresses accessibility and the non-sanctified character of a building, providing it with an impartial structure.

The Muslim juristic debate showed that the prime consideration in choosing a location to hold court was accessibility and appropriatedness.[1739] Accessibility is key for the office to be held regularly. Appropriatedness was a central part of an official public structure, yet one that would prevent voyeuristic interests, so Shāfiʿī. Muslim scholarly definition and practice of regular activities as official duties entailed accessibility, publicity, transparency, and judicial accountability, and were principally safeguarded on a locally convenient and time-convenient basis. Both a judge's centrally located home and even more the chief mosque were places that must have been central and easy to locate. The *qāḍī*'s court, most often held in the chief mosque of the city, served as public space *par excellence*: no one was legally restricted from filing a complaint, or simply hearing others' complaints in the mosque.[1740]

The bureaucratic authority of the judge was thus also benefitting from adjudication organized as an accessible, public, and transparent institution. For a judge to adjudicate in the mosque, the religious implications cannot be ignored, despite the fact that the mosque served as multi-functional place, yet a place that always reminded everyone of the presence of God.

c. Office Hierarchy and Judicial Personnel

Bureaucracy functions on the basis of work division, office hierarchy and levels of graded authority as an ordered system of super- and subordination. In a bureaucratic system; there is a supervision of the lower offices by the higher ones.[1741]

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p. 135; see also Wakīʿ, *Akhbār al-quḍāt*, III, p. 415, were the *ḥadd* punishment was executed by the governor in the mosque.

[1739] Hallaq, "The Qāḍī's Diwān" (1998), p. 418.

[1740] Tillier, "Women before the Qāḍī" (2009), p. 281.

[1741] Weber, *Wirtschaft und Gesellschaft* (1980), pp. 551-554.

Despite Islamic legal history's focus on the *qāḍī* as the prominent embodiment of the administration of justice[1742], the judge did not act alone in dispensing justice. Prior to the second/eighth century, al-Kindī notes the judge was assisted only by his clerk (*kātib*). Yet, by the second century of Islam, the evolution of a court staff emerged, with assistants to aid the judge in a variety of ways.[1743]

We can now also return to the quote by Khaṣṣāf in which he describes the court officials together with their seating arrangements, this time to highlight the judicial personnel:

On his arrival in the mosque the *qāḍī* would salute the audience, offer two or four units of prayer (*rak'as)* of prayer, and ask God to grant him success and guide him towards the right path, so as to enable him to uphold the truth and save him from transgression. After that, he would sit facing the Kaʿba [in Mecca]. Court chamberlains would stand in front of him, at such a distance that they might hear the *qāḍī's* conversation with the litigants. The *qāḍī* placed his *qimaṭr* [container with court records and registers] on his right-hand side. The clerk (*kātib*) sat near him, at such a distance that the *qāḍī* could watch his performance, while the deputy judge (*nā'ib al-qaḍī*) stood in front of him and called the litigants in turn. The clerk (*kātib*) would stand near to him. The *qāḍī* allowed the jurists and other trustworthy persons (*qawm min ahl al-thiqa wal āmāna*) to be seated near him, so that it would be easier for him to consult them on complicated legal issues. The two litigants would sit side by side in front of them. [1744]

The quote shows that by the time of Khaṣṣāf, there were more people assisting the judge than his clerk, or scribe, (*kātib*) only. The staff of a judge were chosen and employed by each acting judge, the selection procedure itself is not documented though. Often, when judges arrived to the city they were newly appointed to, they chose to recruit assistants requesting advice from people they knew they could trust. [1745]

The *qāḍi* was free to chose the type and numbers of his assistance, but it seems that clerks (*kātib*), deputy judges (*nāi'b* or *khalīfat al-qāḍī*), judicially accredited witnesses

[1742] Hallaq, "The Qāḍī's Diwān", (1998), pp. 417-420, comparing *Black's law dictionary* definition of court in the "Western" context with the Islamic context and arguing that the West attached much more importance to a building and a body of assistants than did the Islamic legal example.
[1743] Kindī, *Kitāb al-Wulāh*, p. 386.
[1744] Khaṣṣāf, *Adab al-qāḍī*, sec. 80, pp. 85-86. Surty, "The Ethical Code" (2003), p. 156.
[1745] See Chapter Three, I. 1.b.; Tillier, *Les Cadis* (2009), p. 399-400.

(*shuhūd al-ʿudūl*) and those officials in charge of the inquiries about witnesses (*ṣāḥib al-masā'il*)[1746] as well as a chamberlain (*ḥājib* or *jilwāz*) increasingly belonged to a fixed *qāḍī's* staff.[1747] The *qāḍī's* staff was accountable towards the *qāḍī* as their superior only. The judicial staff was paid from the budget assigned to the *qāḍī*: In the early 140s/late 750s, the Basran judge Sawwar b. ʿAbd Allah is reported to have allotted regular salaries for assistants and witnesses.[1748] In his bureaucratic function, the *qāḍī* was the only one who could appoint and remove them from office.[1749] The idea of delegated authority, on which the authority of the judge largely rested, was carried on also to his staff.

The deputy judge (*khalīfat al-qāḍī* or *nā'ib*) was hired to assist the judge in practical matters of adjudication, like organizing the order of court sessions. Moroever, some deputy judges were also hired for adjudication in large territorial jurisdictions which the judge could not cover alone, as discussed under aspects of local jurisdiction.[1750] Some deputies were given powers to hear certain types of disputes, while others had full jurisdiction but were limited in territorial terms.[1751] It was already mentioned that some deputies could later rise to the posts of caliphally appointed judges.[1752] At times, the deputy judge acted as interim judge until a new one was appointed.[1753] Despite the important role deputy judges had, there is only little concrete information available on them, and on the rank they occupied within the judicial staff's hierarchy.

The clerk's (*kātib* or *amīn*[1754]) role was considered prime within adjudication, or as *W. Hallaq* would put it, "without him the business of the court would come to a halt".[1755] This is evidenced not only by the more detailed accounts but also by their names taken

[1746] Tsafrir, *The History* (2004), p. 164, note 14.
[1747] Further staff titles were al-aʿwan (the court ushers), al-ḥājib (the chambarlain), al-bawwāb or al-jilwāz (the court sheriff or bailiff), al-muzakkī (the secret investigator), al-mutarjim (the interpreter), al-qāsim (the distributor), amīn al-ḥukm (the legal trustees), and al-wakīl (the agent or solicitor). Surty, "The Ethical Code" (2003), p. 157.
[1748] Wakīʿ, *Akhbār al-quḍāt*, II, p. 58.
[1749] Hallaq, *Origins* (2005), p. 80, 86; Surty, "The Ethical Code" (2003), p. 157.
[1750] See above, fixed local jurisdictional areas, Chapter Four, I.3.a.aa.
[1751] Hallaq, *Origins* (2005), p. 80.
[1752] See the training provided to deputy judges, as a means of judiciall professionalization, Chapter Four, I.2.b.
[1753] Isḥāq b. al- Furāt was deputy judge of Muḥammad b. Masrūq al- Kindī in Egypt. When al- Kindī was dismissed from office in 184, the deputy judge took over the office and was dismissed that same year, Wakīʿ, *Akhbār al-quḍāt*, II, p. 238.
[1754] Wakīʿ also uses *amīn* for *kātib* (clerk), *Akhbār al-quḍāt*, II, p. 58; Masud "The Study of Wakīʿ's" (2008), p. 121.
[1755] Hallaq, "The Qāḍī's Diwān" (1998), p. 422.

down by the chroniclers. Ther clerk's duties consisted of making a full written record of the statements of the parties in the lawsuit, the plaintiff's claim, the defendant's defence, the testimony of the witnesses and the judge's decision.[1756]

More than that, the clerk would assist the judge in writing the judgments: It was already recounted that Ḥanafī judge Ibrahīm ibn al-Jarrāḥ (205-211/820-826) used to put down different legal opinions of prominent jurists on the back of the case record and mark the one he preferred. Then his clerk would take this indication and prepare the decree on this basis.[1757] During the reign of caliph Abu Jaʿfar (r 136-158/754-775), clerk Yazīd b.ʿAbdallāh used to write the verdicts in the name of judge Ghawth without putting down his name on any of them.[1758] One time, the clerk of the judge, took over adjudication while the judge was sick and could not sit on cases for long. [1759] In this exception, it seems, the clerk effectively took over adjudication. According to al-Kindī, judge of Egypt al-Umari (appointed 135/752-3) had not one but several secretaries.[1760]

Given the importance of the clerk in the production of judicial decisions, Khaṣṣāf and Shāfiʿī recommend the judge to look for particular qualifications when chosing the clerk, quite similar to the judge[1761]: The clerk should be a pious and honest Muslim, and should have adequate knowledge of the Sharīʿa.[1762]

Written by members of an elite group for other elites, the judicial chronicles by Wakīʿ and al-Kindī focus predominantly on judges, leaving less room for the works of the subordinate judicial personnel. However, exceptions were made for the clerks (*kātibs*) and (less so) deputy judges (*nāʾib*) as they must have been considered relevant for adjudication: in many cases their names were documented.

Most *qāḍī's* seem to have hired also a court sheriff, (often called *jilwāz*), whose function it was to keep order in the courtroom.[1763] Wakīʿmentions the court sherrif in instances

[1756] Khaṣṣāf, *Adab al-qāḍī*, sec. 82, p. 88.
[1757] On judge Ibrahīm balancing school opinions, see Chapter Three, II.6.a.; Kindī, *Kitāb al-Wulāh*, p. 432.
[1758] Kindī, *Kitāb al-Wulāh*, p. 359.
[1759] Kindī, *Kitāb al-Wulāh*, p. 355.
[1760] Kindī, *Kitāb al-Wulāh*, p. 394. See further examples of clerks at court, Kindī, *Kitāb al-Wulāh*, p. 215, 231; Wakīʿ, *Akhbār al-quḍāṭ*, II, 2, p. 115; III, 231.
[1761] On the prescribed qualifications of the judge, see Chapter Two, V.1.a.
[1762] Khaṣṣāf, *Adab al-qāḍī*, sec. 33, p. 53. Similar qualifications for the clerk were set up by Shāfiʿī, *Kitāb al-umm*, VI, p. 227.
[1763] Wakīʿ, *Akhbār al-quḍāt*, II, 417, Khaṣṣāf, *Adab al-qāḍī*, sec. 128, p. 124-125. Hallaq, *Origins* (2005) p. 60, it seems that the court sherrif had become an established functionary by the end of the first century.

where he fulfils tasks usually carried out by a policeman, assistant, or secretary.[1764] Khaṣṣāf's *adab al-qāḍī* work has included a separate chapter on the court sheriff, which means that someone other than the judge should be responsible for the important task of organizationally structuring the court sessions.[1765]

Similarly, the court chamberlain or court usher (*ḥājib,* sometimes also *jilwāz*) supervised the queue of litigants, called upon various persons to appear before the judge. [1766] They would also function as bodyguards, protecting or segregating the judge from the litigants, if need be. Shāfiʿī himself advised the judge against using a *ḥājib*.[1767] Reasons for Shāfiʿī's stance are entailed in the very term *ḥājib*, literally barrier or shield. The judge is neither to guard himself against the public, nor have a *ḥājib* decide, or filter, which litigation parties are permitted to bring their case before the judge. The judge segregating himself from the public and the fear of the *ḥājib* taking bribes to let litigants pass through to the judge are early Shāfiʿī reasons against the employment of the judge. [1768]

Witnesses in Islamic legal history are features of the court, and are therefore mentioned also in the *adab al-qāḍī* literature. They give testimony to overall procedure of adjudication and to the documentation of evidence, a characteristic also laid down in the Qur'ān (2:282).[1769] As such they observed and controlled the lawful course of action at court.[1770] In this role, each judge confirmed and appointed a number of witnesses for such purposes to his court. Witnesses thereby became a permanent part of the judicial staff. They also served to sign court minutes at the end of each litigation. Known as court witnesses (*shuhūd ḥāl*), they fulfilled a different function than witnesses procured by the

[1764] For example, Wakīʿ, *Akhbār al-quḍāt*, II, p. 215; Masud "The Study of Wakīʿ's" (2008) p. 215.
[1765] Khaṣṣāf, *Adab al-qāḍī*, I, 142-143.
[1766] Hallaq, *Origins* (2005), p. 85. On the judges employing court chamberlains see Wakīʿ, *Akhbār al-quḍāt,* II, p. 37; III, p. 168; Kindī, *Kitāb al-Wulāh*, p. 386.
[1767] Shāfiʿī, *Kitāb al-umm*, VI, p. 220.
[1768] In slighty later, influential, *adab al-qāḍī* works of Māwardī and Ibn Abī Dam, these Shāfiʿī scholars approve of a chamberlain or court usher (*ḥājib)*, however under the conditions of political stability and only when the *ḥājib* would not take unlawful steps discriminating against litigants. In this case, a *ḥājib* would actually aid in bringing order in the proceedings of the court. Both jurists list the qualifications a *ḥājīb* required for his position. Reasons for this substantial turn from Shāfiʿī's clear position against taking a *ḥājib* to the concessions leading to the authorization of the office of ḥājib can be seen in the factual development of the office. Schneider, *Das Bild des Richters* (1990), p. 38-39.
[1769] Hallaq, *Origins* (2005), p. 61.
[1770] Schneider, *Das Bild des Richters* (1990), p. 47; Hallaq, *Origins* (2005), p. 88;

plaintiff or defendant to attest for a fact or claim. The latter were known as *shuhūd ʾayān*.[1771]

The institution of the accredited witnesses (*shuhūd ḥal/ʾudūl*) involved a procedure by which the *qāḍīs*, after having ascertained the reliability would, recognize the person as a trustworthy witness whose testimony could not, in principle, be doubted. This institution was introduced in 174/ 790 by *qāḍī* al-Mufaḍḍal ibn Faḍāla.[1772] The duty of the accredited witnesses (*ʾudūl*) was to testify to the authenticity of legal documents such as trusts, wills, and promissory notes.[1773] This function was similar to the present-day function of the 'notary public'.

Historical reports also make it clear that by the middle of the second century (ca. 770 C.E.), witnesses became not only a fixture of the court but also paid employees of the *qāḍī*, and also controlled the budget of the court.[1774]

Because the integrity (*ʿadālah*) of the accredited witnesses was key for their function[1775] to verify the authenticity of a testimony and to exclude false evidence, judges started to investigate the trustworthiness and integrity of witnesses. Thus, the duty of the investigator (*muzzakī or sāḥib al-masā'il*) was to investigate the character of the witnesses, particularly through interviewing family and neighbours of the witness on his or her trustworthiness. [1776] Judge Ibn Shubruma (d. 144/761) is documented to have introduced a covert way of investigating.[1777]

Some judges like judge Lahīʿah b. ʿIsā al-Ḥaḍramī, appointed 196/811 in Egypt, ordered during his second tenure that the investigations on the witnesses' trustworthiness to be

[1771] Hallaq, *Origins* (2005), p. 61.
[1772] Kindī, *Kitāb al-Wulāh*, p. 399; Surty, "The Ethical Code" (2003), p. 159.
[1773] Kindī, *Kitāb al-Wulāh*, p. 386; Surty, "The Ethical Code" (2003), p. 159.
[1774] However, court witnesses in Egypt in 322/ 934 did not succeed with their claim to be paid by the *qāḍī* as his employees. Kindī, *Kitāb al-Wulāh*, p. 549, see also Mez, *Renaissance* (1937), p. 219; Schneider, *Das Bild des Richters* (1990) p. 47.
[1775] Wakīʿ, *Akhbār al-quḍāt*, II, p. 385. Ziadeh, "Integrity" (1990), p.77-87.
[1776] Kindī, *Kitāb al-Wulāh*, p. 361, 394-395, 422, 437, 545; Wakīʿ, *Akhbār al-quḍāt*, II, p. 416; III, p. 116. Shāfiʿī, *Kitāb al-umm*, VI, pp. 305-306, Schneider, *Das Bild des Richters* (1990), p. 220. However, judge Mufaḍḍāl b. Faḍālah, appointed in 174, was heavily criticized by the people and the poets that he had made burglars his accredited witnesses, and that he fixed the number of witnesses to ten, considering this something new, Kindī, *Kitāb al-Wulāh*, p. 386.
[1777] Wakīʿ, *Akhbār al-quḍāṭ*, III, p. 116, 120. ʿAbdallāh b. Shubruma, *qāḍī*, legal scholar and ḥadīth narrator (*muḥaddith*), (d. 144/761), Vadet, "ʿAbdallāh b. Shubruma" EI2, III, p. 938. Ghayth ibn Salmān (removed from office in 144/761, d. 176/ 792) is recorded as having introduced this institution to Egypt, Kindī, *Kitāb al-Wulāh*, p. 361.

renewed every six months and that those whose reputations were damaged should be removed from the list of witnesses. [1778]

The number of witnesses could vary according to each judge, the judge alone had the right and competence to decide how many witnesses he would assign to his court. In Egypt, judge Mufaḍḍāl b. Fadālah (in office 174-177/790-793) appointed ten witnesses[1779], judge ʿUmarī (in office 185-194/801-809) had one hundred witnesses[1780], Judge Lahīʿa (in office 196-204/811-819) reduced their number to thirty. [1781]

In the third century of the Islamic calendar, *qāḍīs* adopted the practice of entrusting to a legal trustee (*amīn al-ḥukm*), being a trustworthy person charged with the safekeeping of the assets of legally incompetent persons, such as orphans and absentees.[1782] The *amīn al-ḥukm* was meant to take care of the non-litigation tasks of the judge, dealing with the trustee positions. Wakīʿ mentions also a prison warden (*sajjān*) as court official and assistant to the judge[1783], delegated by the judge to take care of prisoners, as was a further non-litigatious task of the judge, as pointed out above.[1784]

Also, some courts whose jurisdiction included regions inhabited by various ethnic and linguistic groups were also staffed by an interpreter.[1785]

According to Khaṣṣāf, the appointment of an agent or solicitor (*wakīl*) for the defence of the parties' interests before the court was also considered lawful, though theoretical preference was given to coming to court in person.[1786]

The judge could also employ experts for questions of inheritance law or for family matters. In cases of inheritance, *qāḍīs* were in need of experts who could divide property

[1778] Kindī, *Kitāb al-Wulāh*, p. 417.
[1779] Kindī, *Kitāb al-Wulāh*, p. 386.
[1780] Kindī, *Kitāb al-Wulāh*, p. 396.
[1781] Kindī, *Kitāb al-Wulāh*, p. 417.
[1782] Khaṣṣāf, *Adab al-Qāḍī*, p. I, p. 597. Surty, "The Ethical Code" (2003), p. 159; Schneider, *Das Bild des Richters* (1990), p. 120-121, Masud/Peters/Powers, *Dispensing Justice*, pp. 9, 14, 20-21.
[1783] Wakīʿ, *Akhbār al-qāḍī*, I, p. 132; Masud, "The Study of Wakiʿ's" (2008), p. 121.
[1784] On non-litigation tasks of the judge, see Chapter Four, I. 2. aa (2.).
[1785] See for instance Wakīʿ, *Akhbār al-qāḍī*, III, p. 135 on a case were the litigants, a man and his female slave, before judge Ibn Abī Layla were from Sind (today's Pakistan) and were in need of a professional interpreter. Interpreters were needed were the litigants were non-Arabic speakers. On the translator (*mutarjim*) at court, Shāfiʿ, *Kitāb al-umm*, VI, p. 220; Hallaq, *Origins* (2005), p. 85.
[1786] Khaṣṣāf, *Adab al-qāḍī*, sec. 265, p. 241; sec. 724, p. 627. See also al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, sec. 269, p. 244, regarding an agent (*amīn*) for women "who do not go out". Surty, "The Ethical Code" (2003), p. 159.

among the persons entitled to inherit in accordance with Sharīʿa laws of inheritance, called distributor or *qāṣim.* [1787] Family matters often necessitated the judge to use female judicial staff. Female judicial experts were needed to investigate legal questions related to women's bodies, (e.g. virginity, pregnancy, abortion, birth, suckling, sexual "shortcomings"). Female judicial staff was also needed to test the trustworthiness of female witnesses, and to matters relating to domestic, private or female space.[1788]

The quote provided by Khaṣṣāf on the personae present at court, included also jurists, sitting close to the judge to assist him in difficult legal questions.
Yet, these jurisconsults at court were in no bureaucratical relation to the judge, they were not court staff members and were in no relationship of formal subordination to the judge. Rather, the court's prestige and authority was enhanced by the voluntary presence in it of men learned in the law.[1789] These were the legal specialists (*fuqahā'*, *muftīs*) who made the study and understanding of law their primary private concern.[1790] The sources are frequently unclear as to whether or not these experts of law were always physically present in the court. *W. Hallaq*, however, suggests that it was likely that they attended the court often, or that judges wrote to the jurisconsults asking their opinion with regard to matters of law that they found complex and unclear. [1791]

In terms of office hierarchy and judicial personnel, the Abbasid court provided a bureaucratic structure that consisted of a judge and any number of assistants (*aʿwan*) who engaged in the division of labor. They were all in the relationship of subordination to the judge, as they were chosen, appointed, salaried, and supervised by the judge. The judge supervised the performance of all his assistants, or delegated tasks of supervision to his clerks.[1792] Their task was to take over different organizational aspects of adjudication so that the judge could focus on his main task: dispensing justice. The judicial staff enhanced the judge's bureaucratic authority, especially when the number and tasks of the staff aided an efficient and quick judicial process to the benefit of the overall judicial structure and the litigants.

[1787] Surty, "The Ethical Code" (2003), p. 159.
[1788] Tillier, "Women before the Qāḍī" (2009), p. 285-287.
[1789] Hallaq, *Origins* (2005), p. 88-89.
[1790] Hallaq, *Authority* (2001), p. ix, pp.166–235; Hallaq, *Origins* (2005), p. 88.
[1791] Hallaq, *Origins* (2005), p. 88.
[1792] For example when the judge ordered his clerks to supervise the renewed trustworthiness of the witnesses, Kindī, *Kitāb al-Wulāh*, p. 417.

d. Written Documents as Basis for Bureaucracy: Court Registers, Files and Judicial Archives, Appointment and Removal Certificates

The idea of bureaucracy as an office with written documents allows for the replacement of officials without any loss for the office.[1793] Bureaucracy is therefore centrally based upon written documents (the files) which are preserved.[1794] There is, therefore, a staff of subordinate officials and scribes to handle the documents. Not only the body of officials actively engaged in a public office but also the respective apparatus of material and the files, make up a "bureau", or desk.[1795]

The continuity of adjudication was mediated through the *qāḍī's* office and that of his *dīwān*, with the *diwān* representing the totality of the records (*sijillāt*) kept by a judge.[1796] According to Kindī's report Sulaym b. ʿItr was the first Muslim *qāḍī* in Egypt to make a written record of his decisions sometime between 40/660 and 60/679.[1797] The context of Kindī's report had to do with the need to keep track of court decisions for future reference: When Sulaym decided in a matter of inheritance, the parties to the lawsuit seem to have appealed his decision, i.e. a dispute had arisen amongst them subsequent to his verdict that made it necessary to revisit the previous documents. In the wake of this appeal or dispute, Sulaym decided to record this and other cases in *sijills*.[1798]
It is difficult to assess to what extent a *qāḍī's diwān* was kept systematically between the time of *qāḍī* Sulaym and the beginning of the Abbasid judicial reign, i.e. between 660-750 C.E.[1799] However, with the beginning of the Abbasids, judicial *diwāns* were being increasingly mentioned in judicial chronicles*, adab al-qāḍī* works, and biographical dictionaries.[1800]

The record (*sijill)* produced at court first consisted of a brief statement of the case and of the decision rendered by the judge. The brevity of the *sijill* throughout the first century of

[1793] Weber, *Wirtschaft und Gesellschaft* (1980), p. 126, 552.
[1794] Baer, *Rechtssoziologie* (2011), p. 125-126.
[1795] Baer, *Rechtssoziologie* (2011), p. 126.
[1796] Hallaq, "The Qāḍī's Diwān" (1998), p. 425; Hallaq, *Origins* (2005), p. 92.
[1797] Kindī, *Kitāb al-Wulāh*, pp. 309-310.
[1798] Kindī, *Kitāb al-Wulāh*, pp. 309-310, Hallaq, "The Qāḍīs Diwān" (1998), p. 432.
[1799] Hallaq, "The Qāḍī's Diwān" (1998), p. 432.
[1800] Hallaq, "The Qāḍī's Diwān" (1998), p. 432.

Islam is suggested by at least two reports about judges Sawwar b. ʿAbd Allah[1801] and al-Mufaḍḍal Ibn Faḍāla. The former, a Basran *qāḍī* who served during the reign of caliph al-Mansūr (136-58/754-775), became widely known for being the first *qāḍī* to have written long and elaborate *sijillāt* (and for enlarging his judicial staff).[1802] The same novelty was attributed to Ibn Faḍāla, who also served as judge in Egypt until 169/785.[1803]Around the middle of the second/ eighth century that matters such as inheritance, bequests, debts and custody of orphans were recorded as records (*sijills)* in the *dīwān*.[1804] The record of prisoners became part of the *dīwān* by the beginning of the third/ninth century latest.[1805]The administration of endowments (*waqf*) seems to have been brought under the *qāḍī*'s jurisdiction and entered into his *dīwān* some time earlier. Tawba b. Nimr is reported to have been the first Egyptian *qāḍī* under whom this transformation took place, sometime before 118/736, when he died or was removed from office.[1806] Regarding witnesses, it is almost certain that their names and just character (or lack thereof) were entered into the *dīwān* prior to the end of the second/eighth century: Muhammad b. Masrūq, who was appointed *qāḍī* in Egypt between 177/793 and 184/800, had already followed this practice, so did his successor 'Abd al-Rahman al-ʿUmari.[1807] It is significant that this Ibn Masrūq is also associated with another development in the history of the *qāḍī's dīwān*. He is believed to have been the first Egyptian *qāḍī* to have stored or carried the written materials of his *dīwān* in a *qimaṭr*, which in those times was a sort of a bookcase in which documents and sheets of papyri were preserved.[1808] Before then, these materials were placed and carried in a piece of cloth (*mandīl*).[1809]

According to *W. Hallaq*, by the end of the second/eighth century, the judicial *dīwān* took more or less its final form. From this point onwards, the sources speak of no additions to the *dīwān*, and begin to take the practice of keeping and maintaining a *diwān* for granted. Between the middle of the second/eighth century and the fourth/tenth, the sources demonstrate a rich historical narrative in which *dīwāns* an integral part of judicial

[1801] On judge Sawwar and his judicial staff, see Chapter Four, I.3.c.
[1802] Wakīʿ, *Akhbār al-quḍāt*, II, p. 58.
[1803] Kindī, *Kitāb al-Wulāh*, p. 379.
[1804] Ibid., p. 355, 379.
[1805] Ibid., p. 450.
[1806] Ibid., p. 346.
[1807] ibid., p. 394.
[1808] That the sheets of writing in this period were made of papyri is attested by Kindī, *Kitāb al-Wulāh*, p. 362.
[1809] Kindī, *Kitāb al-Wulāh*, pp. 391-392; Wakīʿ, *Akhbār al-quḍāt*, II, p. 164.

practice. In addition to those early reports just cited, there are many others speaking of *dīwāns* changing hands, bribing clerks to write one thing or another in the dīwān, refusing to act in accord with a predecessor's *dīwān*, caliphs confiscating *dīwāns*, *qāḍī's* who were removed for failing to take proper care of their *dīwāns*, recording one particular or another in the *dīwān*, ways of keeping *dīwāns*, how certain *qāḍīs* treated their own *dīwāns*, etc.[1810]

The contents of *dīwān al-qāḍī* was important in two regards: As the basis for a *qāḍī's* decision and as the place where the *qāḍī* recorded that he requested a *fatwā*. The *diwān* consisted of two components, *maḥāḍir* (sg. *maḥḍar*) and *sijillāt*, with the *maḥdār* being the basis of the *sijill*. The *maḥḍar* refers to any of two different types of document: (1) a statement made by witnesses to the effect that someone has, for instance, sold, bought, pledged or acknowledged something. It served as the basis for the judge's decision; (2) a record of the two parties' actions and claims taking place in the presence of the *qāḍī*, who must sign it before witnesses in order for it to be complete. On the other hand, the *sijill* consists of a witnessed record of what the *maḥḍar* contained, together with the *qāḍīs* decision (*hukm*) on the case.[1811] Accordingly, "the *maḥdar* is logically the basis (*asl*) of the *sijill*, the latter being constructed from the former".[1812]

It is noteworthy that later one of the functions of keeping *maḥāḍir* had to do with the *qāḍī* consulting *muftīs* concerning difficult cases. By keeping such a record and by stating therein that he issued an *istiftā'*, the *qāḍī* would apparently make his request for a *fatwā* official.[1813] No *fatwā* was evidenced in the judical archives of the early Abbasid era although written *fatwās* were usually deposited with the person who commissioned them.

[1810] Kindī, *Kitāb al-Wulāh*, pp. 360, 394, 398, 407, 410, 432, 450, Waki', *Akhbar al-qudāṭ*, II, pp. 125, 136, 156, 159, 161, 164, 172, 174, 'Asqalani, *Raf al-'Isr,* pp. 269, 280, 294, 296, 297, 298, 337, 342. Hallaq, "The Qāḍī's Diwān" (1998), p. 433.
[1811] Hallaq, "The Qāḍī's Dīwān" (1998), p. 420 with further references.
[1812] Jaṣṣāṣ, *Sharḥ adab al-qāḍī*, p. 372, as cited by Hallaq, "The Qāḍī's Diwān" (1998), p. 420.
[1813] See 'Umar b. 'Abd al-'Aziz al-Husam al-Shahid, *Sharh adab al-qadi*, p. 69, as cited by Hallaq, "The Qāḍī's Diwān" (1998), p. 420, note 23.

W. Hallaq has compiled a list of what a *qāḍī's diwān,* in addition to *maḥāḍir* and *sijillāt,* usually contained[1814], showing an acute awareness for the need to produce and preserve files for the judicial bureaucracy:

1. *Ṣukūk*, which include contracts of sale, pledges, acknowledgements, gifts, donations and other instruments.[1815] The importance of the art of composing official documents was explictly mentioned in the case of judge of Egypt Bakkār b. Qutayba (d. 270/884) who was said to have have learned this craft from famous jurist Hilāl al-Ra'y[1816]; 2. A register of the witnesses whose credibility has been established, and those who have been disqualified. Included here are the names of the *qāḍī*'s agent who undertook the task of examining the character of these witnesses or former witnesses (*muzakkī*).[1817] ʿAbd al-Raḥmān b. ʿAbdallah al-ʿUmary, in office 185-194/801-809, was the first to lay down or remove the names of the witnesses in the registers (*kitāb*), and thereby established a legal bureaucratic tradition that was kept up by succeeding judges.[1818] 3. A register of prisoners, including the date on which they were imprisoned, and the reasons for conviction[1819]; 4. A register of trustees over endowments, orphans, divorcees' alimonies, etc.;[1820] First time that the finances of orphans were registered by a judge in the public treasury with all incoming and outgoing sums registered started in 133/750.[1821]; 5. A register of bequests (*waṣāyā*)[1822]; 6. Copies of letters sent from one *qāḍī* to another (*kitāb ḥukmī* or *kitāb al-qāḍī ʿilā al-qāḍī*), and of relevant legal documents that were attached to the letter.[1823]

The judicial portable archive (*qimṭar*) thus included complete sets of records, crucial for the tasks of litigation and non-litigation. Judge Khālid b. Ṭālīq (appointed by caliph al-

[1814] Hallaq, "The Qāḍī's Dīwān" (1998), pp. 420-421.
[1815] Kindī, *Kitāb al-Wulāh*, 319; Wakīʿ, *Akhbār al-quḍāt*, II, p. 136, p. 174; Jaṣṣāṣ, *Sharḥ adab al-qāḍī*, pp. 57-62.
[1816] Kindī, *Kitāb al-Wulāh*, p.477.
[1817] Kindī, *Kitāb al-Wulāh*, p. 389, p. 394; 'Asqalani, *Raf al-isr*, II, p. 280; al-Shafi'i, *Kitāb al-umm*, VI, pp. 305-306.
[1818] Kindī, *Kitāb al-Wulāh*, p. 394.
[1819] Kindī, *Kitāb al-Wulāh*, p. 450.
[1820] Kindī, *Kitāb al-Wulāh*, p. 355.
[1821] Kindī, *Kitāb al-Wulāh*, p. 355.
[1822] Kindī, *Kitāb al-Wulāh*, p. 379.
[1823] Kindī, *Kitāb al-Wulāh*, p. 410. See also Hallaq, "Qadis communicating" (1999), pp. 415-436. Hallaq mentions two other types of registers, one, a register of guarantors (kufalā'; sg. kafl), and a register of those who have been legally qualified and empowered to act as agents (wukalā'; sg. wakīl). Hallaq, "The Qāḍī's Dīwān" (1998), p. 428. However, for these last two types of registers, no early formative evidence is available.

Mahdī), for instance, made two copies of the every decree, each attested by witnesses. One copy was preserved in the records'archive.[1824]

The *dīwān*, i.e. the entirety of judicial records were kept by the judge and were normally filed in a bookcase termed a *qimatr* stored in a solid container, protecting them from damage and stains.[1825]

Khaṣṣāf emphasized that the *qāḍī* should keep the *qimaṭr* with him, and that the *qimaṭr* should be with the judge when he leads his court sessions, placed on his right-hand sight.[1826] In fact, judge Masrūq (in office 177-184/793-800) who was the first to introduce the *qimaṭr* as a solid box to Egypt would store the box in a fixed place and would always have the *qimaṭr* with him when he was in court sessios.[1827] It is indeed very likely that the judge kept the *qimaṭr* in his possession, or deposited it with a trusted person. Al-Kindī reported that in Egypt judge ʿIsa b. al-Munkadir (in office from 212-214/827-829) deposited his *qimaṭr* in the store of a man but when it was discovered that the record of one of the cases had been interfered with, the *qāḍī* arranged for special accommodation to be rented in the house of a certain ʿAmr ibn al-ʿAṣ, where the *qimaṭr* was kept behind a door, which the *qāḍī* himself kept locked and sealed.[1828]

Examples from Egypt and Iraq show that the bureaucratization of the judiciary was both a phenomenon of the center and the provinces as well.

The *qimaṭr* also played a significant figurative role when judges sought to resigne from office and requested the caliph's acceptance. When judges asked to resign from all his offices, some did so orally and underlined their words by the following symbolique gesture: ʿAfiya b. Yazīd al-Awdī requested caliph al-Mahdī to discharged him from functions as judge of ʿAskar al- Mahdī.[1829] To underline his request, he did the following symbolic gesture: He brought his *qimaṭr* with him, the box in which the judicial documents were collected and sealed by the *qāḍī* during his tenure, and were kept in his domicile and passed over to his successor after his removal from office. The *qimaṭr* indeed represented the judicial activity and the protection of the rights of the individuals.

[1824] Wakīʿ, *Akbhār al-quḍāt*, II, p. 125; Masud "The Study of Wakīʿ's" (2008), p. 122.
[1825] Hallaq, "The Qāḍī's Dīwān" (1998), p. 426. For further information on the *qimaṭr*, see Tillier, *Les Cadis* (2009), pp. 400-407.
[1826] Khaṣṣāf, *Adab al-qāḍī*, sec. 80, p. 86.
[1827] Kindī, *Kitāb al-Wulāh*, pp. 391-392.
[1828] Kindī, *Kitāb al-Wulāh*, p. 437.
[1829] Al-Khaṭīb, *Ta'rīkh Baghdād*, XII, p. 30; Ibn al-Jawzī, *al-Muntaẓam*, V, p. 433; Tillier, *Les Cadis* (2009), p. 255.

To bring the archive with him was therefore a way to lobby on the caliph so that he would agree to release him from office responsibilities. To bring the *qimaṭr* signalled that the *qāḍī* had already abandoned the idea of filling his functions within society. Other *qāḍīs* had similar ways, as Asad b. ʿAmr al-Baghālī (m. 190/805-806), *qāḍī* of Wasit, and later of Madīnat al-Manṣūr (both Iraq) shows.[1830] By the role that he could play during the resignation of a *qāḍī*, the qimaṭr acquired a symbolic force such as simple fact "to seal the *qimaṭr*", illustrates, namely that a *qāḍī* intended to ask for his removal from office. [1831] Shārik b. ʿAbd Allāh (d. between 177/793-179/796) by sealing his *qimaṭr* succeeded in achieving the acceptance of his resignation from the governor of Kufa. [1832] Jaʿfar b. Muḥammad b. ʿAmmār, *qāḍī* of Kufa under caliph al-Mutawakkil acted in the same way when he had a conflict with the post official (*ṣāḥib al-barīd*) of the region and threatened to stop any judicial activity.[1833] Also, the confiscation of the *qimaṭr* by the delegating power meant the removal from office of the *qāḍī.* [1834]

The location of the *qāḍī's* documents is a sensitive issue, given that there was no specifically designated court building. This, so *W. Hallaq*, is probably an important reason for why so many court records were did not survive and are very difficult to reconstruct from the remaining primary literature.[1835] In fact, records of *qāḍī* judgments are available only after the sixteenth century, though there is rich evidence that records of the *qāḍī* judgments were kept meticulously. [1836]

The assumptions for the loss of these records are many, ranging from the weak role of adjudicative law-making in the development of Islamic law in general, to the strong role of oral testimony in Islamic law.

The first argument recurs to the idea that Islamic law (*fiqh)* did not recognise court cases as precedents or as a source of law and that they were rarely made part of the *fiqh* texts. [1837] In fact, although it was common practice for judges to retain a record of court proceedings, their decisions do not appear to have attracted the attention of the jurists who were concerned with elaborating and establishing the doctrines (*furūʿ*) of their

[1830] Al-Khaṭīb, *Ta'rīh Baghdād*, VII, p. 20; Ibn al-Jawzī, *al-Muntaẓam*, V, p. 543. Tillier, *Les Cadis* (2009), p. 255.
[1831] Tillier, *Les Cadis* (2009), p. 255.
[1832] Wakīʿ, *Akhbār al-quḍāt*, III, p. 151. Tillier, *Les Cadis* (2009), p. 256.
[1833] Wakīʿ, *Akhbār al-quḍāt*, III, p. 164. Tillier, Les Cadis (2009), p. 256.
[1834] See Wakīʿ, *Akhbār al-quḍāt*, II, p. 156; See Hallaq, "The Qāḍī's Dīwān" (1998), p. 427.
[1835] Hallaq, "The Qāḍī's Diwān" (1998), p. 416.
[1836] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 80.
[1837] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 80; Hallaq, "The Qāḍī's Diwān" (1998), pp. 422.

school.[1838] Though questions arising in judicial disputes were intensely discussed by the jurists (*fuqahā'*), these discussions seem to have been connected with *fatwās* and the judicial disputes were often explained by the fact that the judge engaged with the *muftī's* opinions.[1839] Thus, one could argue that despite the bureaucratization of the judiciary, court cases did not attract the attention of the jurists, were thus not particularly protected to preserve and therefore Abbasid judicial bureaucratization did not serve judicial continuity. However, *W. Hallaq* has explained that we simply do not know why pre-modern, i.e. pre-Ottoman court materials have not survived and has convingly argued that just because they have not survived does not mean that they were not cared for within the judicial system. [1840]

The second argument raises questions as to the importance of the written, and hence the degree of bureacuratization in the pre-modern Islamic legal history of adjudication.
In fact, the status of the written in the Muslim judicial system is ambivalent. Some people often determined the mistrust of the jurists towards written documents by the fact that they were too easily forgeable.[1841]
In deed, the Islamic theory of contracts does not prescribe written formats for transactions. A written agreement *per se* does not give rise to any obligation, nor does it constitute competent evidence in the event of litigation. Theoretically, a written document can acquire legal force only through the verification of its contents by the oral testimony which is the decivise factor in determining the existence and nature of an obligation. The existence of documentary evidence constitutes, at best, corroborative evidence only. By denying validity to documentary evidence and confining legal proof to oral testimony, Islamic law deviated from Qur'ānic injunction (2:282) and from prevalent Near Eastern legal practice. Reasons for this development have not been conclusively addressed.[1842] *I. Schneider* refers to later Shāfiʿī *adab al-qāḍī* works of Māwardī and Ibn Abī Dam who both emphasized that at court written documents were valid only with the confirming testimony of witnesses. A judge's decision based only on

[1838] See Schneider, *Das Bild des Richters* (1990), p.174; Hallaq, "The Qāḍī's Diwān" (1998), pp. 422-429.
[1839] Hallaq, *Authority* (2001), p. 191.
[1840] Hallaq, "The Qāḍī's Diwān" (1998), p. 417.
[1841] Wakin, *The Function of Documents* (1972), p. 4, 6; Fitzgerald, "The Alleged Debt" (1996), p. 100 Tillier, *Les Cadis* (2009), p. 395.
[1842] Schacht, *Law in the Middle East* (1955), I, p. 39; Tyan, *Le Notariat et le Regime de la Preuve par Ecrit dans la Pratique du Droit Musulman* (1945), p. 10.

written documents was not possible.[1843] Professional witnesses provided the oral testimony required to give the written contracts evidential force, satisfying the practical need for written records and the theoretical insistence on the oral testimony of the witnesses.[1844] Yet, so *I. Schneider*, the lasting role of oral testimony, may have been one reason for the fact that court records did not survive, as without testimony court records were considered to have lost their validity.[1845]

However, despite their devaluation by legal theory, written documents continued to be in use throughout Islamic legal history.[1846] There is considerable evidence to the importance attached to written documents.[1847] Many documents, Arabic papyri, contain hundreds of examples of sale contracts, tax receipts, etc, all duly witnessed and with the names of the witnesses recorded.[1848] As human memory is likely to err, it was recommended to the witness to have a copy of the letter, which would serve him as aide-memoire. For *B. Johansen* the strength of the legal effect results rather in the combination of the word of the witnesses and of the written document.[1849] Writing and orality did not mutually exclude each other, but instead maintained a relation of complementarity. [1850] For the judge this means that he could base his decisions on both the oral and written, a way to come closest to the facts of the case. The judicial archive could thus be safeguarded in a dual way: the written documents, which could always be tampered with, needed oral testimony for their validity to gurantee judicial continuity.[1851]

The idea of bureaucracy as an office with written documents allows for the replacement of officials without any loss for the office. Similarly, the *qimṭar* as a portable archive allowed for the replacement of judiciary due to the rotation of judicial posts in the Empire. As soon as a new judge would take over from the previous judge, the *qimaṭr* would entail information needed for a smooth transition of judicial personnel. In fact, when a new judge took over adjudication, he was to appoint witnesses, in order to take

[1843] Schneider, *Das Bild des Richters* (1990), p. 117; Wakin, *Function of Documents* (1972), p. 1.
[1844] Udovitch, *Partnership and Profit in Medieval Islam* (1970), p. 87. For more on the role of professional witnesses in Islamic law, see Tyan, *Le Notariat et le Regime de la Preuve par Ecrit* (1945).
[1845] Schneider, *Das Bild des Richters* (1990), p. 117.
[1846] Udovitch, *Partnership and Profit in Medieval Islam* (1970), p. 87.
[1847] Ibid.
[1848] Johansen, "Formes de langage" (1997), p. 357.

[1849] Johansen, "Formes de langage" (1997), p. 357.
[1850] Tillier, *Les Cadis* (2009), p. 397.
[1851] Tillier, *Les Cadis* (2009), p. 397.

charge of the *diwān*, or court registers, from the deceased *qāḍī*. Thus, when judge Ibn Bilāl passed away around 138 A.H., succeeding judge Ghawth went to Ibn Bilāl's house where he collected the *diwān* (the judge's chancellery) and the *wadā'i'* (*amanāt* of other people, things like property, letters, etc. entrusted to the judge) that were there. No indication was made of judge Ghawth being accompanied by witnesses when he picked up the *dīwān*, which might be why former judge Ibn Bilāl's daughter is said to have later considered this a despicable deed.[1852]

A removed *qāḍī*, meanwhile could either hand over to his successor in person, or authorize two trustworthy persons to do so.[1853] Khālid b. Ḥuṣayn al-Ḥarīthī, *qāḍī* under caliph al-Mahdī (reg. 158-69/774-85), was reportedly one of the first, or the first, to have insisted on retaining the original copy of the *dīwān*, and on having the incoming *qāḍī* make two copies of the entire *dīwān*, both copies attested by witnesses.[1854]

Judicial bureaucratization also entailed caliphal appointments and removals of judges from office that also came in writing, as already evidenced in the section on the centralization of the judiciary.[1855] The written character of the caliphal appointment certificate increased steadily. [1856] For examle, *qāḍī* Saʿīd b. Salmān al-Musāḥiqī's notice in Wakīʿ shows that after only twenty-five years of Abbasid rule, all appointments made by caliph al-Mahdī (r. 775-785) came in writing.[1857]

Appointment certificates existed in sufficient numbers to speak of a systematic use, however it remains difficult to tell if every judge received a written appointment

[1852] Kindī, *Kitāb al-Wulāh*, p. 360.

[1853] For more on the passing *qimaṭr* between two judges, see Tyan, *Histoire de l'organisation judiciaire* (1960), pp. 93-94. On the archives of the judges and their *qimaṭr*, see also Tillier, *Les Cadis* (2009), pp. 400-407.

[1854] Wakīʿ, *Akhbar al-qudāt*, II, 125. Hallaq, "The Qāḍī's Dīwān" (1998), p. 426.

[1855] See also Kindī, *Kitāb al-Wulāh*, p. 449; Wakīʿ, *Akhbār al-quḍāt*, III, p. 240.

[1856] Not many certificates are existent today, a reconstruction of their content is nearly impossible. Even the prominent appointment letter Letter sent from al-Manṣūr to judge of Basra, ʿUbayd Allāh b. al- Ḥassan al-ʿAnbarī at his nominatin in 156/ 772-73 includes rather recommendations (*waṣiyya*), probably added following the appointment formula which did not survive. Wakīʿ, *Akhbār al-quḍāt*, II, p. 91. See als Schneider, *Das Bild des Richters* (1990) p. 183. Tillier, *Les Cadis* (2009), p. 236.

[1857] Wakīʿ, *Akhbār al-quḍāt*, I, p. 238; Masud, "The Study of Wakīʿ's" (2008), p. 120. On the transition from oral to written appointment certificates, see Tillier, *Les Cadis* (2009), pp. 231-238. On the oral "performative act" of appointing a judge and the standardized caliphal or governmental appointment formular "qad wallaytu-ka l-qaḍī" ("I have appointed you judge") also see Tillier, *Les Cadis* (2009), p. 231. Although Tillier underlines the written element in Abbasid judicial policy, he also concludes that the written appointment certificates did not seem to have substituted the oral pronouncements Tillier, *Les Cadis* (2009), p. 237.

certificate or whether oral appointments nevertheless occurred[1858], and how this affects the argument of bureaucratization of the judiciary. The appointment certificate however was sometimes called appointment book (it was first called book, *kitāb*, and later treaty, *'ahd*).[1859] While in the first notion book, the early innovation of the written element was stressed, the later circulating notion *'ahd* increasingly stressed the contractual relationship between caliph and judge.

In the Abbasid judicial administration, written documents played an increasingly significant role.[1860] The bureaucratization of the judiciary was both a phenomenon of the center and the many provinces as well. Practically speaking, the extent to which this bureaucratization was possible was due to the large scale production of paper, used for the documentation of testimonies and verdicts as well as appointment and removal certificates. [1861] Significantly, the bureaucratization of the judiciary fell into a time of increasing literary production of legal works and of judicial documents.[1862] Judges, and their clerks, had to master the production of written documents.

For *Hallaq*, the fact "that the judicial *dīwān*, as a formal institution that was kept systematically, was taken for granted by all members of the legal profession is one of the most striking features in the written discourse of pre-modern Islam".[1863] The *diwān* with its many types of files and documents as well as the portable judicial archive (*qimatr*) also evidenced that the judge's office was bureaucratized, and that files were a major tool in rationalizing and professionalizing adjudication, adding to the professional and bureaucratic authority of the judge.

[1858] Written appointment certificates become more systematic in the first half of the fourth/ tenth century, Tillier, *Les Cadis* (2009), p. 236.
[1859] Hallaq, *Origins* (2005), p. 80.
[1860] Heck, *The Construction of Knowledge* (2002), p. 60
[1861] Under the Abbasids paper-making technology was introduced into the Islamic world by Chinese prisoners of war in 134/751. Paper quickly supplanted all other writing materials during the first decades of the Abbasid era, when its use was championed and even dictated by the ruling elite. It is arguably the most important factor of the spread of knowledge in general, so Gutas, *Greek Thought, Arabic Culture* (1998), p. 13. On the introduction of paper and its effect on governance see also Spuler, *The Muslim World*, I, p. 57.
[1862] On the high literary production during the early Abbasids, see for example, Johansen, "Wahrheit und Geltungsanspruch" (1997), p. 991.

[1863] Hallaq, "The Qāḍī's Dīwān" (1998), p. 429.

e. Official activity: Adjudication as Full Time Occupation

The official, bureaucratized activity demands the full working capacity of the official. This is not to say that the bureaucratic personnel, including the judge, have to work full working hours, yet a sufficient number of hours to dedicate their professional life to this one task. Required were enough hours to keep the judicial business running, accessible and productive for those who need judicial services. Similar to bureaucratization, professionalization theory also requires the criterion of full-time occupation, and was as such already discussed and affirmed: The judge and his staff have gradually shifted from adjucation combined with further jobs to full time occupation, increasingly dedicating their time, energy and commitment to adjudication.[1864]

f. Conclusion: Bureaucratic Apparatus Enhancing the Judge's Authority

The Abbasid judiciary demonstrated elements of bureaucratization as a dynamic process in which the judge increasingly emerged as a bureaucratic authority. Bureaucratic authority is built on hierarchy, delegation, and accountability in which decisions are matters of individual responsibility and are imperatives for subordinates.[1865]
The professional, divisional working modus of the judiciary was made possible by fixing local and subject-matter jurisdictions, by establishing a public, transparent and accessible system of adjudication, with the judiciary largely, and at least in theory, reachable to those in need for judicial services. The judge's work was both supported by a subordinate judicial staff and a system of files and archives, all serving the idea of an operationalization of the law, in the sense of ensuring justice through a regular application of the law, allowing for the accountability of the *qāḍī's* individual responsibility and leaving little space for wanted arbitrariness in law. [1866]

Bureaucratization is connected to the creation of authority. The *qāḍī* as a bureaucratic authority was in a position of superiority towards his staff. The judicial staff was there to assist in professionally focusing on the core task, dispensing justice. Files and archives were introduced to protect rights, contributing to the authority of the key bureaucratic figure, the judge. Similarly, creating continuity generates authority for the office of the

[1864] See full time occupation as criterion for professionalization, Chapter Four, I. 2. f.
[1865] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 961.
[1866] See Baer, *Rechtssoziologie* (2011), p. 125.

judiciary, like the transfer of judicial archive from one judge to the other by a written documentation of transferral by witnesses. This, for example, assists the judge in handling rights as a trans-temporal aspect, safeguarding the registered rights of the individual beyond the lifetime of the single judge.

To this end, the *qāḍī* as the officer concerned with the administration of the Islamic legal system increasingly emerged as a bureaucratized authority, affirmatively handling the complexities and the myriad details of the law. *Max Weber* described bureaucracy as "a power instrument of the first order" which produces not only a social structure but also a discernibly coherent social grouping in the society.[1867] In this sense, the judges emerged as a group of legal personae that enjoyed a particularly high degree of bureaucratic authority. The judge became part of a bureaucratic apparatus whose bureaucratic bonus laid in a binding system of regulations that attempted to ensure justice through law.[1868] The judge enhanced his authority through the "rule of the desk"[1869], vis-à-vis his staff, the litigants and the jurisconsults who encountered the judge as public figure in his office.

4. Conclusion: Judge as Institutionalized Authority

The *qāḍī's* claim to authority largely rested in his caliphal appointment. But the judicial authority of a *qāḍī* resided also in the institutionalized framework of professionalization and bureaucratization as provided by the centralized state structure.

Institutionally, the judicial system created in the first decades of Abbasid rule centralized control over the courts (and restricted influence of local leaders) while at the same time has contributed to augment the authority of the judge. With this newly gained freedom, or independence, judges became free to professionalize, partly in an autonomous way, partly through state-driven reforms, such as monopolizing the profession and developing it into a full-time occupation which made a comprehensive professional dedication to adjudication possible. Centralization, i.e. the granting of delegated caliphal authority on

[1867] Weber, *Wirtschaft und Gesellschaft* (1980), p.126.

[1868] On the negative side of the judge in the bureaucrativ system: "The judge can go wrong by becoming a petty dictator, by surrendering to corruption, by becoming a bureaucrat, or by failure of heroism." Kennedy, *Critique of Adjudication* (1997), p. 3. On the dichotomy of autonomy and bureaucracy, see Parsons, "Professions" (1968), pp. 540-543 and on the negative aspects of bureaucracy see briefly Baer, *Rechtssoziologie* (2011), p. 125.

[1869] Baer, *Rechtssoziologie* (2011), p. 125.

the judge, thus additionally enabled the judge to develop a professional authority, distinguished from other legal and judicial offices.

Abbasid judicial policy of centralization had a transformative impact on the judge. Centralization together with professionalization and bureaucratization influenced the status order of the judge and his role in the wider political and legal community. The differentiation from other governmental-legal tasks worked to enhance the judge's authority, as well as his independence from all but the caliph. Though the latter could remove the judge from office, revise his judgments in the court of complaints, imprison the judge in case of violations of the law or political opposition to caliphal politics. Yet, there was no direct way for anyone, not even the caliph, to interfere into adjudicative decision-making.

The close association with the State, tightened by centralization, also made the office of the judge more vulnerable to the critique of moral and financial corruption. This account harmed and possibly reduced the judge's authority in the eyes of at least some of his contemporary jurists and historians who condemned many judge's (real or imagined) corruption.

The judiciary's professionalization occurred together and was even compatible with bureaucratization.[1870] The example of the Muslim judiciary during the formative period showed that professionalization and bureaucratization emerged as complimentary processes, professionalization of the judiciary occurred largely within the bureaucratization of the judiciary, overlapping and supplementing the instruments of the judicial workings. The autonomy of the judicial profession during the formative period was not restricted by the bureaucratic apparatus – a vice of increasing bureaucratization – but quite conceivably intertwined and augmented a proficient dealing with the judicial business.

It is in this sense that the judge turned into an institutionalized authority, an authority based on established rules.[1871] The officers of law were professionalized and

[1870] Professionalization and bureaucratization were seen as compatible by Max Weber and Talcott Parsons, see Weber, *Wirtschaft und Gesellschaft* (1980), pp. 552-553 and Parsons, "The Professions and Social Structure" (1939), pp. 457-67.
This position was not shared by the following generations of sociologists. Succeeding studies rather focused on the problem of how increasing bureaucratization reduced the freedoms of the professions. For a debate on these positions, see Rueschemeyer, "Professionalisierung" (1980), p. 316

[1871] The term institutions derives from the latin *institutiones* which refers to established rules, Ratnapala, *Jurisprudence* (2009), p. 243.

bureaucratized and could refer to the highest authority in the Empire, the caliphs, to boost their authority.

With these structural changes augmenting the judge's authority, changes in his status occurred. The judge did not only have authority, he had authority to act. His authority in the sense of authorization denotes status which was built on the normative questions regarding the actions of the authority; the judges' actions were done on the basis of caliphal appointment as a law.[1872] To be authorized is to be permitted by someone who has authority to act in a certain manner. [1873] The judge had authority based on the authorization through offical state appointment to issue decisions.

The *qāḍī* enjoyed authority by virtue of his office, i.e. he had *Amtsautorität*. This *Amtsautorität* was achieved through an official, inaugurative act and was principally independent of the personal qualities of the incumbent.[1874] A *qāḍī's* authority came with the appointment certificate and was largely a reflection of his office. Yet, unlike the conventional definition of *Amtsautorität*, the *qāḍi*'s authority was not quite divorced from the person of the judge – moral and religious integrity remained crucial for a judge's ability to maintain his position. Yet, the authority it constituted was intimately linked with the *office* of the *qāḍī*, and less with his personality. It is in this sense, that it constituted an impersonal authority directly linked with the office.[1875]

The institutionalization of the judge's authority signals in deed an increasing shift from person-centred to institution-centered.[1876] This means that the legitimacy of an official's authority is in principal impersonal, and dependent on the legitimacy of the office. Yet, it would be too categorical to say that the personal qualities of any official can contribute nothing to the legitimacy of the official's authority, as does legal philosopher *Shapiro.* [1877] The office is decisive, yet an empirical approach makes it necessary to additionally

[1872] On authority as authorization, see May, *Autonomy, Authority and Moral Responsibility* (1998), p. 128.
[1873] Shapiro, "Authority" (2002), p. 398.
[1874] Rabe, "Autorität" (1992), p. 385. The inaugurative act in European history came originally through the act of priesterly consecration.
[1875] During the era of European Enlightenment, all coerced authority, i.e. mere *Amtsautorität* was perceived as a deficient form of authority. The focus on reason and distrust of authority lead to the idea that real authority was grounded in morality and reason. As a consequence, Amtsautorität was not considered as authority, see *Deutsche Encyclopädie* (1779), II, p. 609, as cited by Rabe, "Autorität" (1992), p. 395.
[1876] On the increasing bureaucratization and institutionalization of Abbasid administration, see Heck, "Law in ʿAbbasid Political Thought" (2004), p. 107.
[1877] Shapiro, "Authority" (2002), p. 401.

evaluate its legitimacy also by the expertise of its current occupant. [1878] That the *qāḍī's* authority was in deed largely considered as linked to his office, and this sense impersonal, is shown by the chronicles. The judge's statut after he left the office of judiciary is that of an ordinary man.[1879] The jurists and historians of the time had an interest in the functional approach to adjudication, though this always also included the judge's moral and religious integrity as part of adjudication as long as he was in office. After his tenure, though, as *M. Tillier* puts it, "the *qāḍī* loses his performative character".[1880]

Parallel to *Amtsautorität*, *Amtscharisma* signifies that the charisma is a charisma based on the office, through regulated appointment and insignia. [1881] In fact, in the Abbasid case the judge's authority majorly bases on the caliphal appointment. Insignia, visible symbols of this charisma by virtue of office, is however not the way, judges underlined their authority. Only little attempts were made to distinguish judges through their clothing, their location of authority, or whatever else might serve to underline their authority to have the final word in questions of worldy justice.

In the end, the authority of the judge is bound by the very system that administers and adjudicates the law, the organizational form creates or enhances authority. A judicial system that is centralized, professionalized and bureaucratized reflects respectively on the judge: The judge was largely seen as a delegate of the Abbasid caliph who was strengthening his Empire. Thus, the judge was not seldomly associated with the moral and financial corruptions the association with the Empire set off.

[1878] Shapiro, "Authority" (2002), p. 401 however argues that the expertise of the current occupant adds nothing to the legitimacy of the office.
[1879] Al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, sec. 378, p. 330. Tillier, *Les Cadis* (2009), p. 258.
[1880] Tillier, *Les Cadis* (2009), p. 258. Arab historians showed little interest in the judge's after they left the *qāḍī* position. Once out of their office, *qāḍīs* lost influence on the legal community, the population, or, importance for the governing. Tillier though nevertheless poses the questions what role judges played after their removal: did they continue benefiting from the prestige linked to their former function? Did their word enjoy a particular status with their contemporaries? Did the society reserve for them a place of choice for the rest of their days? Tillier, *Les Cadis* (2009), p. 257. However, those judges who returned as scholars to their community of legal scholars lived on as authorities, see Chapter Four, III.2.f.
[1881] Weber, *Wirtschaft und Gesellschaft* (1980),p. 692.

II. Failed Unification of the Law: No Restraints on the Authority of Judge and Jurisconsult

Centralization of the judiciary did not result in a centralization of the law. Ideas to codify the law, however, were an extended wish to centralize the judicial system. While the Abbasids managed to practice a balance between control and independence of their officials who administer the law, they were not successful in their efforts to gain control over the law itself. What constituted binding authoritative legal texts and the use of individual reasoning and its extent to which it could be used in (adjudicative) law-making though became a burning question in the first centuries – and was differently answered throughout the Empire.

This legal diversity across the legal board made caliphal secretary Ibn al-Muqaffa‘ to prominently push forward with an attempt to sort the texts, especially what constitutes binding Sunnah (legal traditions) and how to regulate the use of legal discretion (*ra’y)* to standardize the law in the Empire. Efforts were made to compile and canonize, if not to codify the law, an endeavour the legal scholars did not support and eventually prevented from materializing.

What does the status of the law, codified or non-codified, do with the authority of the interpreting legal personae, be it the judge or the legal scholar? Does a unified and standardized law- if we take this to be an effect of codification- bind and thus decrease the authority of legal personae in interpreting and applying the law? And, conversely, does the failure or lack of codification augment the authority to interpret the law?

It is therefore important to see what ideas of unfiying and standardizig of the law circulated during the Abbasid times: compilation, canonization or codification. How were the attempts to unify the law meant to restraint the judiciary, and how did the failure of a top-down legal homogenity impact the authority of judges and legal scholars?

The question of the lack of codification is being discussed here because the authority of the law also impacts the authority of legal personae. The status of the law at that time marks an ambivalent divide between the centralized judiciary and the decentralized legal scholars. The eventual failure to codify makes less restraints on judges and legal scholars

- even though the idea of a codified law to bind the judiciary, and the legal scholars, is in itself a debateble idea, as follows. Yet, the status of the law, diverse and plural, might explain why legal scholars were continuously consulted by judges.

1. Compilation, Canonization, or Codification?

Before discussing the way the status and *authority of the law* affect the status of *authorities in the law*, it seems necessary to briefly discuss three different concepts circulating on how law can be unified and made accessible for the judiciary: compilation, canonization and codification.[1882]

Early forms of ordering the law were achieved through compilations of laws. Prominently, Roman Emperor Justitian in the sixth century C.E. ordered the compilation of the *Corpus Juris Civilis*. Together with its third part, the *Codex Justinianius*, this was in itself no codification but instead a systematic compilation of existing legal texts of different origins. [1883]

In contrast, canonization is a way of prioritizing and consolidating the laws, of giving preference of legal writings of some over others, and of therby creating normativity.[1884] It is a selection process of existing writings, aiming to define the law through a "particular set of knowledge, a particular set of problems, and a particular set of texts".[1885] These texts are often private elaborations of the summaries of the law, and they have a long history in the premodern world. Canonizations largely were done by legal scholars who compiled teachings and made practices throughout the country uniform or standard.[1886] Examples of this can be found in the history of the Islamic school of law (*madhhab*) were the private scholars through their assemblation and commentaries, and treatise gave the works of great masters the status of a canon. Their canonizing of legal texts made certain teachings leading for the coming generations of jurists from that school. Through their commentaries, private scholars gave the works of great masters the status of a canon. Canonization, in this sense was an informal

[1882] I thank scholar of European legal history *Joachim Rückert*, Frankfurt/Main for pointing out historic differentiations of unifying the law.
[1883] Röhl/Röhl, *Allgemeine Rechtslehre* (2008), p. 576.
[1884] A survey of canonization as employed to describe the process of authoritative ḥadīth collections has been provided by Brown, *The Canonization of al-Bukhari and Muslim* (2007). On canonization as a "discursive shift" of the relationship between the Muslim community and its authoritative texts, see El Shamsy, *The Canonization of Islamic Law* (2013), p.4.
[1885] Sarat, *Preface The Blackwell Companion to Law and Society* (2004), p.X.
[1886] Jones-Pauly, "Codes and Codification" (2009), p. 34.

codification.[1887] It meant interpreting and expanding the masters' rules, then circulating the rules as textbooks. The result was not standardization but a contribution to an ongoing discourse in which dissenting positions of schools of law and individual scholars were taken for granted. Through their contributions, the private jurists determined the limits of licit dissent and of consensus and thus exerted a standardizing influence.[1888]

Codification, in opposition to compilation and canonization, means the written compilation of all laws into one book that is understood to make the law easily accessible. A new text is thereby created, aiming at comprising all existant legal sources, including precedent and customary law and issuing it as a legislated law. Codifications thus are legal books that summarize and thereby validate the law, or at least great parts of legal fields. [1889] Codification as subject of heightened legal debates was introduced in continental Europe during 18th-19th century as an engagement between the legal norms and judicial decisions, as well as an answer to the multiplicity of laws, or disorder, that prevailed in large parts of continental Europe.[1890] Codifications can have a conservative or revolutionary character. A conservative codifcation merely aims at summarizing existant laws in a clear and comprehensible way, removing doubts and contradictions. This does not mean, though, that codification is comprehensive, conclusive or final.[1891] Such a clarifying and simplifying of law usually is combined with reforming the law to a degree. A revolutionary codification, however, substitutes the old law with the new. [1892] Codification, of whatever character, is usually pursued with the aim to provide certainty in law, to bind the judge and to determine the law.[1893] However, codification should not "naively"[1894] be considered to be the answer for dealing with the uncertainty in law and for binding the judge. It is not. And even without a codification, there are many other

[1887] Jones-Pauly, "Codes and Codification" (2009), p. 34.
[1888] Jones-Pauly, "Codes and Codification" (2009), p. 34.
[1889] Röhl/Röhl, *Allgemeine Rechtslehre* (2008), p. 576.
[1890] With specific reference to judicial decision-making see Hübner, *Kodifikation und Entscheidungsfreiheit des Richters in der Geschichte des Privatrechts* (1980), pp. 21-24. More generally on the concept of codification in European legal history, see Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (1960) in particular pp. 341-343; Wieacker, *Privatrechtsgeschichte der Neuzeit* (1967), pp. 390-393 on the renowned *Kodifikationsstreit* between Savigny and Thibaut with the relevant arguments on the advantages and detriments of codification, and more in general pp. 468-470.
[1891] Eckertz-Höfer, "Vom guten Richter" (2009), p. 739.
[1892] Röhl/Röhl, *Allgemeine Rechtslehre* (2008), p. 577.
[1893] Hassemer, "Rechtssystem und Kodifikation" (2011), p. 251; Van Caenegem, *Judges, Legislators and Professors* (1987), p. 128. With reference to scholarly debates in 19th century Germany, see Ogorek, *Richterkönig und Subsumtionsautomat?* (2008), pp. 269-273.
[1894] Hassemer, "Rechtssystem und Kodifikation" (2011), p. 252.

ways of binding and monitoring the judge, as the role of the jurisconsult in adjudication has shown both normatively (Chapter Two) and empirically (Chapter Three).

Which ideas of unifying the law circulated at the time of the formative period? What was the aim of unifying and standardizing the law? In which way was it meant to be realized? How did these ideas affect the freedoms of the judge, and those of the jurisconsult? Were the ideas discussed to eliminante the freedom of the experts in law, reducing their legal reasoning in adjudication, possibly at the benefit of the caliph as highest judicial authority?

2. State Arguments for Legal Codification: Weaponry against the Judiciary

Ideas to unify the law were first articulated by Ibn Muquaffa' (d. ca. 139/756), secretary of the second Abbasid caliph al-Manṣūr (r. 754-775). The ideas were followed by caliph al-Manṣūr and caliph Harūn who expressed wishes to unify the law by directly addressing legal scholar Mālik b. Anas, requesting him to provide a unified version of the law for the Empire. Proponents of a legal unification were thus political authorities, a state secretary and two caliphs.

When caliph al-Manṣūr began to politically unify the caliphate, his secretary Ibn Muqaffaʿ advised the caliph that the law and order situation was particularly problematic due to the lack of uniformity in judicial practice. Ibn al-Muqaffaʿ was preoccupied to harmonise judicial practices and to study the reasons for the legal divergences across the Empire. For Ibn Muqaffaʿ, the ills of a lack of legal uniformity were the *qāḍīs* who issued divergent and conflicting judgments, which caused legal chaos.

Ibn Muqaffaʿ's treatise, the *Risāla fi'l ṣaḥāba* (*Letter on Companionship*) [1895] is probably the only text which discusses the idea of early codification, and the treatise itself has gained much attention.[1896] Ibn Muqaffa' himself is one of the best known of early Abbasid secretaries (*kuttāb*).[1897] As a strong proponent of codification, he saw in

[1895] The full title of the work is *al-Adab al-ṣaghīr wa'l-adab al-kabīr wa risālat al-ṣaḥabah.*
[1896] See Goitein, "A turning point in the history of the Muslim state" (1968), pp. 149-167; Rosenthal, *Political Thought in Medieval Islam* (1962), pp. 72-74.
[1897] On him see Gabrieli, "Ibn al-Muqaffaʿ", *EI (2)*; Sourdel, " La biographie d' Ibn al-Muqaffaʿ d'après les sources anciennes" (1954), pp. 307-323; Latham, "Ibn al-Muqaffaʿ and early 'Abbāsid Prose" (1990), pp. 48-77. The text of the *Risāla fi'l- ṣaḥāba* used here is the one edited and published by C. Pellat, *Ibn al-*

codification a "weaponry against the judiciary" (*van Caenegem*)[1898], serving the unification of law (especially legal precedent and traditions)[1899] and restricting the scope and content of customary law as source of adjudication.

The lack of uniformity in his view ran the risk of hampering Abbasid consolidation of power.[1900] Among the things Ibn al-Muqaffaʿ suggests to the caliph is that the nascent Abbasid state should be based on a recognition of the caliph's authority. It should be his sole prerogative to enact and promulgate legal decisions and doctrines in the form of a uniform, binding code. He alone must define what normative Sunna should mean or consist of.[1901] It was the diverging application of the Sunna across the legal board that Ibn Muqaffa' thought was key for the legal chaos. He mentions the situation in both Iraqi metropoles (i.e. Basra and Kufa) and other cities and regions of the Empire concerning the lack of uniformity, and the contradictions as they appeared in the judgments rendered by the judges. The divergences were of serious nature in the treatment of "blood" (death sentences), "women" (sexual crime) and "property".[1902] Ibn al-Muqaffaʿ is concerned that while in the city of al-Hira death sentences and certain sexual acts were considered lawful, they were considered unlawful in the nearby city of Kufa. These discrepancies over the issues of blood, women, and property were considered of high relevance since they were rendered by judges whose orders and decisions were valid[1903] and thus affected the members of the Muslim community.

In his analysis, these divergences have their origin either in the vagueness of a traditions of the Sunna which leads to different legal interpretations[1904] or the use of a dubious

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Muqaffaʿ: conseiller du calife (1976). For an analysis of the contents of the Risāla, see, in particular, Goitein, "A Turning Point in the History of the Islamic State" (1968), pp. 149-167.

[1898] Van Caenegem, *Judges, Legislators, and Professors* (1987), p 152.

[1899] There is a dispute around what Ibn Muqaffaʿ meant with the term Sunna. For some it is the Sunna of the Prophet and the early "rightly guided" caliphs, see Azami, *On Schacht´s Origins of Muhammadan Jurisprudence* (1985), p.41-43. For others it is Umayyad administrative practices and rules, see Schacht, *The Origins of Muhammadan Jurisprudence* (1950), pp. 58-59, 95, 102. See on this debate Motzki, *Die Anfänge der islamischen Jurisprudenz* (1991), pp. 43-44.

[1900] Heck, "Law in ʿAbbasid Political Thought" (2004), p. 97; Arjomand, "'Abd Allah ibn al-Muqaffa' and the 'Abbasid Revolution," (1994), pp. 9-36.

[1901] Ibn Muqaffaʿ, *Risāla fī-l Saḥāba,* pp. 43, 45, para. 26; and see generally pp. 41-45, paras. 24-27.

[1902] Detering crime and proetecting property seem to have been central issues in the push to codify the law. Similarly, it was particularly in the sphere of criminal law that 19th century Germany sought the need to unify and codify the law, given the arbitrary criminal proceedings based on the outdated *Constitutio Criminalis Carolina* (1532), Ogorek, *Richterkönig oder Subsumtionsautomat?* (2008), pp. 41-43. Similar strict positivist concepts of interpretation were made in the civil law, with respect to property, ibid., pp. 49-60, and idem., "Inconsistencies and Consistencies in 19th-Century Legal Theory" (2008), p. 165.

[1903] Ibn Muqaffaʿ, *Risāla fī-l Saḥāba*, para. 34, p. 41.

[1904] Ibn Muqaffaʿ, *Risāla fī-l-Saḥāba*, p. 45.

Sunna[1905] or is due to the ill-considered application of legal discretion (*ra'y*) and analogy (*qiyās*)[1906] which can lead to inconsistencies[1907], and yet might be the legal cause for a death sentence.[1908]

Ibn al-Muqaffa' saw a harmful role in the judges' application of legal discretion (*ra'y*). He proposed that the caliph collects the circulating jurisprudential opinions, together with all conflicting traditions and analogical deductions. Then the caliph should employ his reasoning as highest judicial authority to determine the binding opinion, formulate on each legal matter an opinion that God has inspired in him, and make the law binding law through his legislative force. Then, so Ibn Muqaffaʿ, the caliph was to put everything in writing so that a proper code is established that the judges have to conform to.[1909]
Like this, the caliph would have assembled a comprehensive legal corpus. The unification of the judicial practices is considered a means to harmonise justice according to the opinion of the caliph. Then each succeeding caliph should proceed with the same method.[1910]

Ibn Muqaffaʿ's appears to have advised the caliph for a codification, in which he should collect, revise and rephrase the laws that were to be applied for the entire Empire. Codification was hoped to offer the advantage of binding certainty: the rules are laid down by a person or body in authority. If they are proclaimed in form of a code, certainty is at its highest, for not only can the indidiual know what the law is but, because of the comprehensive nature of the code, she or he has no reason to worry about (customary) rules that might suddenly appear from nowhere and ruin her or his expectations, [1911] or rules that were not even part of what could legitimatly be called legal precedent (Sunna).
Also, from the perspective of an expanding, or at least consolidating Empire, codification might respond to the challenges of a diverse, or non-systematized, application of the law. Codification might solve the question on the appropriate law-making role for agencies; respond to the difficulty of legal sources interpreted in a standardized way where their terms were left vague, or conflicted, and might provide a way to react to regionally

[1905] Ibn Muqaffa', *Risāla fi-l Saḥāba*, para. 35, p. 43.
[1906] Ibn Muqaffaʿ, *Risāla fi-l-Saḥāba*, p. 45.
[1907] Ibn Muqaffaʿ, *Risāla fi-l Saḥāba*, Introduction Pellat p. 9.
[1908] Ibn Muqaffaʿ, *Risāla fi-l Saḥāba*, para. 35, p. 43.
[1909] Ib Muqaffa', *Risāla fi-l Saḥāba*, para. 36, p. 43.
[1910] Ibn Muqaffa', *Risāla fi-l Saḥāba*, para. 36, p. 43.
[1911] Van Caenegem, *Judges, Legislators and Professors* (1987), p. 128.

diverse laws. At the same time, codification would be hoped to decrease the incidence of jurisdictional conflicts, as well as substantive issues decided differently by different courts and political-legal agencies. Ibn Muqaffa', it seems, hoped to have codification solve all these problems with the diversity of norms, outcomes, and institutions in the Islamic legal system.[1912]

Whether Ibn Muqaffaʿ's ideas had ever reached the caliph and how he reacted to them, remains unclear. Instead, there are some reports according to which caliph al-Manṣūr intended to promulgate the legal treatise *Muwaṭṭā'* of the Medinan jurist Mālik b. Anas (d. 179/795), eponym of the Mālikī school of law as the single and uniform basis of legal decisions in the Empire.[1913] Certain accounts even assert that it was caliph al-Manṣūr himself who commissioned the writing of the *Muwaṭṭā'* in the first place.[1914] That it was Mālik who was requested to provide a legal basis, is to be explained with the fact that the Abbasids preferred the Medinan tradition of law: Medina was not only the city in which jurist Mālik lived but, most importantly, the city in which the Prophet lived and influenced Medinese custom and legal practice (*ʿamal*) and Medinan-Mālikī law, and thus responded to the Abbasid self-image of upholding the Prophetic Sunna.[1915] The first Abbasid caliph al-Saffāḥ even instructed Ibn Abī Layla, *qāḍī* in Kufa, to follow the Medinan tradition on a point of law.[1916] Many of those who served as *qādīs* in Baghdad were legal scholars from Medina, especially before the rise of the *Ḥanafīs* to dominance in the judiciary.[1917]

The caliph visited the renowned jurist in Medina whilest on his pilgrimage to Mecca. Caliph al-Manṣūr proposed to him that *al-Muwaṭṭā'a* be adopted as the law of the caliphate but Mālik b. Anas disagreed with the caliph's wishes and persuaded him against it. To legally determine the type of unification, compilation, canonization or

[1912] On the chances of codification unifying the law and binding the judiciary, see Hassemer, "Rechtssystem und Kodifikation" (2011), p. 254-257; and a critique hereof as codification cannot be seen as determining the decision of the judge, as codified law is not the only source of all judicial decisions, Hassemer,"Rechtssystem und Kodifikation" (2011), p. 252, 260-261.
[1913] For the Abbasids plan to unify the legal system of the Islamic state under the law of Medina, see Cottart, "Mālikiyya", *EI (2)*.
[1914] Al-Qāḍī ʿIyāḍ, *Tartīb al-madārik*, I, p. 92; El Shamsy, *The Canonization* (2013), p. 33; Zaman, *Religion and Politics* (1997), p. 84.
[1915] Hallaq, *Origins* (2005), p. 105; Zaman, *Religion and Politics* (1997), p. 128.
[1916] Abū Yūsuf, *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Layla*, p. 37-38. Zaman, *Religion and Politics* (1997), p. 128.
[1917] Tsafrir, *The History* (2004), p. 40. The reasons for the shift from a Māliki to a Ḥanafī dominance in the judiciary is explained in Chapter Four, III.1.e.

codification, one of the earliest historical accounts of the caliph and the jurist is instructive. It reports as follows: Mālik b. Anas narrated,

When Abu Jaʿfar [caliph al-Manṣūr] performed the pilgrimage, he called me. I went to see him and we talked. He asked questions and I replied. Then he said, 'I have resolved to have several copies made of these books that you have composed. I will send one copy each to every Muslim city. I shall order the people to abide by its contents exclusively. I will make them set aside everything else than this new knowledge, because I find true knowledge in the tradition of Medina.' I said, 'O Commander of the faithful [honorific title of the caliph]! Do not do that. Because the people have received various reports, heard several statements, and transmitted these accounts. Each community is acting upon the information they have received. They are practicing and dealing with others in their mutual differences accordingly. Dissuading the people from what they are practicing would put them to hardship. Leave the people alone with their practices. Let the people in each city choose for them what they prefer.' Al-Manṣūr said, 'Upon my life! Had you complied with my wishes I would have ordered so.'[1918]

So the caliph asked for a set of laws that was to be exclusively applied, in all of the Empire, setting aside all other legal rules. He requested one book, accessible to all, a text that was to be newly created. Thus, the caliph requested Mālik to provide a codification.

Mālik remained unimpressed with what the caliph intended, dissuading him by pointing out precisely what Ibn al-Muqaffaʿ had also noted, legal diversity, but to opposite effect. While Ibn al-Muqaffaʿ had called for the caliph's promulgating a code because legal diversity was too inconvenient, Mālik reportedly argued that such regional diversity in legal matters was too developed to be harmonized or regulated and thus neither possible nor Islamically required. It is impossible to be certain about the authenticity of the aforementioned reports concerning Mālik. There is the possibility that they may have been raised by Mālik's students to elevate the renomme of their teacher, for example as the most authoritative of the *fuqahāʿ* by the caliph; or that as an ideal of the (later) Sunnī orthodox spirit, he respected and was prepared to work with the fact that there existed a diversity of approaches to matters of law. Either way, the reports prove that ideas on codification circulated, yet were not implemented. On another level, even if the report on

[1918] Ibn Saʿd, *Al-Tabaqāt al-kubrā* p. 440; Ibn Qutayba, *Al-Imāma wa al-siyāsa*, pp. 219-220. Translated by Masud, "Ikhtilaf al-Fuqaha" (2009), pp. 66-67. In another account, caliph al-Manṣūr intended to write Mālik's *Muwaṭṭaʾ* in letters of gold and have it hung on the Kaʿba to make people follow it, but Mālik refused. On these and further early circulating reports of caliphal requests to Mālik, see Dutton, *Original Islam* (2006) pp. 73-74 and more generally on early references on giving preference to the school of Mālik, pp. 68-101.

Mālik was fabricated, it shows how much official recognition and authority Mālik as legal scholar gathered in the eyes of the caliphs.[1919]

3. Scholars against Codification: Diverse Law no Harm

Mālik's refusal to respond to the caliphal's wish to unify the law was largely met with agreement by the commuity of legal scholars. The legal scholars took a position that favored dissent in the legal and judicial system and opposed codification, and even state-sanctioned compilation of laws for the Empire.[1920] It should not be the caliph, or at least not him alone, despite his highest judicial authority, who should regulate dissent but rather the community of legal scholars.

Mālik's advice to the caliph corresponds with the significance of dissent, accorded by the jurists that ensured a jurist's right to differ with others. Mālik b. Anas recognised the fact that dissents among the jurists were informed, among other causes, by the diversity in reports about the Prophetic Sunna and its transmission, which led to differences in local legal practices. He recommended respecting existing legal practices.[1921] For Mālik, legal diversity and codification clash: Standardizing the law through a written, seemingly comprehensive and exclusive form, contradicted legal diversity as known and practiced at that time.

Similarly, Shāfiʿī (d. 820) discussed differences mostly in terms of geographical locations. In his extensive work *Kitāb al-Umm*, he discussed his dissent with the jurists in the regional places of Iraq, Medina and Syria. Shāfiʿī proposed that consensus of the scholars and the *Sunnah* of the Prophet be the criteria for judging the authenticity and validity of disagreement between legal opinions (*ikhtilāf)*, rather than the local consensus of Medina that Mālik insisted upon. In his treatise, *al-Risāla*, written on the request of caliph Mahdī, Shāfiʿī pleaded that the dissent among the jurists be regulated on the basis of the *Sunnah* and consensus (*ijmā')*.[1922] Unlike Ibn Muqaffa', who proposed that the caliph regulated dissent, Shafi'ī regarded the community of scholars as more qualified to

[1919] Zaman, *Religion and Politics* (1997), p. 149.
[1920] Johansen, "Dissent", Encyclopedia of Legal History (2009), II, p. 345.
[1921] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 67.
[1922] On Shāfiʿī justifying legal diversity in the form of *ikhtilāf,* see also Calder, "Ikthilāf and Ijmāʿ in Shāfiʿī's Risāla" (1983), pp. 55-81.

undertake this task. Thus while Shāfiʿi called for regulating dissent, he also valued it as an important juristic phenomenon, which came to last as an important characteristic of Islamic law throughout Islamic legal history.[1923]

Refusing a top-down codification, Shāfiʿī instead rather wanted to unify the law with the help of the scholarly community. While dissent to some degree needed to be regulated, the legal community, judges and legal scholars, needed to consult and cooperate to standardize the law.

A third prominent jurist, and *qāḍī* of the Iraqi city of Basra, to counter codification was ʿUbayd Allāh b. al- Ḥasan al-ʿAnbarī whose letter to the caliph takes a stand against Ibn Muqaffaʿ's idea of codification and his perceived format to unify the law. [1924] *M.Q. Zaman* points out that al-ʿAnbarī expresses the opposite arguments developed by Ibn al-Muqaffa' to entrust the caliph the care to establish a unified code of law in the entire Empire.[1925]

According to *Zaman*, when the variant sources of law are silent, the Basran *qāḍī* al-ʿAnbarī recognized that the caliph owed to be consulted as the last resort and that jurists had to turn to him to determine the rule to be followed. [1926] The legal authority of caliph would be still recognized by the scholars, and *Zaman* concludes that al-ʿAnbarī recommends, instead of a codification, a close collaboration between the caliph and the legal scholars. [1927]

M. Tillier seeks to qualify the reading of al-ʿAnbarī by *M.Q. Zaman*, limitig the caliph's need to interfere even further.[1928] Not only that it is only in the fields were neither Qur'ān nor Sunna give any indications that the caliph can be consulted. [1929] Additionally, in these cases where the authoritative texts are silent, the *qāḍī* should exercise his independent legal reasoning (*ijtihād*) as a sufficient and legitimate way to deal with the silence and uncertainty of the sources.

Al-ʿAnbarī does not exclude the capacity of the caliph to exercise himself his ijtihād; but since this epistemological skill and authorization is delegated to the *qāḍī*, the *ijtihād* of

[1923] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 68.
[1924] On ʿAnbarī's letter, see Chapter Two, II.3. See also Zaman, "The Caliphs, the ʿUlamā', and the Law" (1997), p. 11, Tillier, *Les Cadis* (2009), p. 622.
[1925] Zaman, "The Caliphs, the ʿUlamā', and the Law" (1997), p. 11-13, Zaman, *Religion and Politics* (1997), p. 91.
[1926] Wakīʿ, *Akhbār al-quḍāt*, II, p. 105. Tillier, *Les Cadis* (2009), p. 622.
[1927] Zaman, "The Caliphs, the ʿUlamā', and the Law" (1997), p. 13; id. *Religion and Politics* (1997), p. 91.
[1928] Tillier, *Les Cadis* (2009), pp. 622-623.
[1929] Wakīʿ, *Akhbār al-quḍāṭ*, II, p. 105.

the caliph had no more authority than that of his delegate, the *qāḍī*. This is were the famous maxim "everyone who exercises ijtihād is right" (*kull mujtahid muṣīb*), of which al-ʿAnbarī was one of the main supporters [1930], elevated the *qāḍī's* judgment to be argumentatively as valid as the caliph's judgment. Or, differently put, the caliph's legal reasoning should be delegated to the judge. Al-ʿAnbarī thus prioritizes the legal reasoning of the *qāḍī* over legal reasoning of the caliph or even codifiction sanctioned by the caliph. As we know by now, legal reasoning of the *qāḍī* should be accompanied by the legal reasoning of the jurisconsult, thus maintaing a say for the legal scholar in adjudication as well.

Only one voice could be found that regretted the missed opportunity of codification. A Mālikī scholar is reported saying that had the caliph carried out his plan, he would have "removed all confusion and prejudice between people."[1931]

Scholars saw in codification a way to stop lived and practiced legal diversity, dissent and legal reasoning, and instead and increased control by the caliph.

4. Conclusion: Decentralized Law – Multiple Authorities

The failed realization of legal codification shows the power of the rising legal scholars. Their authoritative arguments won the debate. The authority of the scholars lead to the strength the scholars had in refusing the idea of codification. Though the main argument was that the diversity in law was not only already too wide-spread but also that legal diversity posed no harm to Islamic law as such and that legal dissent across the judicial board was characteristic of Muslim adjudication. The power of opinionated dissent should prevail. Also, the *ijtihād* of the judiciary should not be infringed upon. It can however not be disregarded that failed codification maintained the room for legal scholars in the legal and judicial system and in filling the space of non-existing codification by giving their own legal opinions, consulting the judge and maintaining their authority in adjudication.[1932]

[1930] Van Ess, *Theologie und Gesellschaft* (1997), II, p. 162.
[1931] Dutton, Yasin *Original Islam* (2006), p. 73.
[1932] This situation is comparable to Germany before the codification of its civil law where legal scholarship had a profound influence on the practice of law. Since no single code applied throughout German territory, scholarship was the principal means of interpreting the learned law, mainly by the issue of binding opinions (*Gutachten*) by the faculties of law to the courts. Buchda, "Aktenversendung", HRG I (1964), pp. 84-87. Van Caenegem, *An Historical Introduction to Private Law* (1992), p. 158.

In spite of the centralization of the judicial administration during the reign of calip al-Manṣūr, the caliph did not succeed neither with the codification, if in mind at all, nor the canonization of the law according to Mālikī understanding of the law. Instead, he continued to request the advice of the local scholars. It is possible that al-Manṣūr would have liked, in accordance with the recommendations of Ibn al-Muqaffaʿ, to unify the legal system and to impose, as in Baghdad, the jurists of the Medinan (*Ḥijazī*) school. But even if he had such hopes, the opposition of the legal scholar prevented any such implementation. [1933] Even if they had the intention of legally unifying the provinces, they chose nevertheless to take into consideration local legal traditions and the authority of local legal scholars.[1934]

Codification failed because of emerging strength of schools in the different regions of the Empire and the power of opinionated dissent. The idea and the attempt to codify did not succeed and was not brought up again. Neither *qādīs* nor *muftīs* were bound by a single state code. The absence of codification might explain why the Abbasids' wish to unify the law of the Empire was made through impacting the choice of judges, preferably Ḥanafīs.[1935]

Caliph al-Manṣūr's request towards Mālik b. Anas indicates two things. First, that the caliph attempted to create a canonical text that would be used uniformly and hence provide the caliph a measure of control. Second, that Mālik refused codifiction or canonization on the grounds of the variety of Muslim practices in the different cities, and possibly wished to remain independent of caliphal authority[1936], scholarly independence being a theme we return to in the next section.

Crucially, the status of the law affects the authority of legal personae. It is generally anticipated that codification binds legal authorities to the law, serves as a restaining means against the judiciary and against unbound legal interpretation, and is a way to unify and standardize the law.[1937] However, during the Abbasid reign ideas to codify the law were countered opposition by the scholars, and even the less formalized canonization

[1933] Tillier, *Les Cadis* (2009), p. 174.
[1934] Tillier, *Les Cadis* (2009), p. 185.
[1935] On caliphal impact through the choice of judges, Tsafrir, *The History* (2004), p. 27.
[1936] Gutas, *Greek Thought, Arabic Culture* (1998), pp. 76-77.
[1937] It was already refered to Hassemer who advised not to be too naive about the effect codification of bindingness can bring about. Even with the law codified, there is ample space to interpret the law, restraining judges and other legal personae only to a certain extent. Hassemer, "Rechtssystem und Kodifikation" (2011), p. 252.

of law and legal texts sanctioned by scholars emerged only step by step, in parallel to the development of the schools of law. In this state, decentralized and non-codified, Islamic law allowed for ample space for legal authorities to interpret the law, bound by authoritative texts, yet not restricted by one state-sanctioned interpretation of these texts. That Islamic law is called jurists' law and that it displayed a variety of opinion has its reasons in "the absence of a central legislative agency"[1938], and in the law's status as non-codified as an important example.

Thus, Islamic law remained jurists' law and developed largely aloof of the state. Legal norms were developed not by political legislators but by individual jurist through individual legal reasoning and the evaluation of the results of that reasoning by competent scholars.[1939] The trope of Islamic law as jurists' law returns at the question of codification. Precisely because Islamic law did not emanate from a political authority but rather as a body of law emanating from the authority of the legal scholars in particular, it was them who could have their final say on the codification idea. [1940] Instead of codification, creating a legal corpus of canonized law was ultimately left to the scholars to do.[1941] Islamic legal history eventually sought control not exclusively in legal hermeneutics, and even less so in codification, but in an extrajudicial authority, guiding and controlling, collaborating and critiquing the judge.

III. Scholarly Authority

We have seen that the way judges were organized had an effect on their authority. Their mode of organization both enhanced their authority as delegated authority of the caliph who centrally arranged the judiciary as increasingly professional and bureaucratic on the one hand. On the other hand, the judges' authority simultaneously diminished precisely because of their affiliation to the state and associations with corruption and politicization of the judiciary by the caliph.

The question I now address is how the jurisconsult's authority was affected by organization: How did the decentralized rise of the legal scholars, to which the

[1938] Hallaq, *Authority* (2001), p. 125.
[1939] The political authorities have a right to enact political measures and norms (siyāsa or qanūn) but are, at least since the Abbasid period, no longer considered lawgivers in the field of Islamic normativity, Johansen, "Dissent", Encyclopedia of Legal History (2009), II, p. 345.
[1940] Hallaq, *Authority* (2001), p. 125.
[1941] Similarly, Bearman/Vogel, *The Islamic School of Law* (2008), p. ix.

jurisconsults belonged, contribute to their authority? How did they professionalize as learned elite, and how did they develop into an expertocracy, with which effects for their authority? How did scholarly independence shape authority when at the same time jurists benefited from a patronage system which was at work to tie some of the legal scholars to the caliphal court?

1. Decentralized Rise of Legal Scholars within the Centralized Caliphal System

To see how the jurisconsults were organized, they have to be seen within their larger social group of *ʿulamāʾ*, the religious-legal scholarly elite that also functioned as jurisconsults.[1942]

They claimed the right, on the basis of their acquired knowledge, to develop methodological tools to interpret the authoritative texts of the Qur'ān and Sunna, and to compose authoritative texts themselves. [1943] Many of them can also be called *muftī*-scholar as they contributed to the production of Islamic literary works. Within the body of legal scholars and *muftīs*, there was an internal rank. The rank of the jurists was distinguished primarily by the proficient knowledge of texts and methodology, increasingly also of school doctrine, and the qualifications to exercise legal reasoning *ijtihād*, mastering the tools of original legal reasoning on the basis of the revealed texts.[1944] This knowledge is crucial as it sets apart not only the more proficient from the less proficient legal scholar but also marked a demarcation towards anyone outside the field of legal knowledge. Knowledge as a vital aspect of generating authority[1945] thus was constitutive for the legal scholar's personal and professional positioning in society. A particular form of personal authority (or functional authority), is expert authority based on superior special knowledge[1946], that is called epistemological authority in the following. As laid out by *ḥadīth*, their superior knowledge in religion and law granted the *ʿulamāʾ* the epistemological authority as "heirs to the prophets" (*warathat al-anbiyāʾ*), or the "people that bind and unbind" (*ahl al-ʿaqd wa-l-ḥall*).[1947] With this early

[1942] That the *ʿulamāʾ*, the people of knowledge can also function as jurisconsults, has been explained in Chapter Two, V.1.b. Hallaq also equates the *ʿulamāʾ* (scholars) with the *muftīs* (jurisconsults). Hallaq, *Authority* (2001), p. 192.
[1943] Hallaq, *Authority* (2001), p. 6; Krämer/Schmidtke, *Introduction: Religious Authority* (2007), p. 5.
[1944] Hallaq, *Authority* (2001), p. 4.
[1945] Bahrdt, *Schlüsselbegriffe der Soziologie* (2003), p. 169. On knowledge as a significant elemet of authority, see also Chapter One.
[1946] Gukenbiehl, "Autorität" (2001), p. 29.
[1947] Krämer/Schmidtke, *Introduction: Religious Authority* (2007), p. 11.

acknowledgment, the *ʿulamā* were already seen as a distinguished, elevated part of society.

a. Decentralized Scholarship

Decentralized means two key things that sets the position and authority of the legal scholar apart from the judge. One, the scholarly hubs for learning were regional, and were at no point centralized, though later they became trans-regional. Thus, there was not one centre for scholarship, no center established by the caliphs, nor by legal scholars themselves. Instead, several regional centres emerged, notably Kufa and Basra in Iraq, Medina and Mecca in the Hijaz, and Syria. This is reflected by the description of "people of Kufa" (*ahl al-Kufa*) or people of Medina (*ahl al-Medina*) to indicate the adherence to a regional school. The "people of Kufa" represented by and large the Ḥanafi, and the "people of Medina" the Mālikī school of law. However, these regional affiliations were in fact much more diverse, and groups centered around renowned scholars were fluid, much movement to-and-fro by scholars existed so that many more of such groupings of scholars must have existed, so that the term "regional schools" had created quite some debates.[1948] Despite the broad variations that must have existed within one region and within one learning circle, or emerging school, judicial chronicles do capture instances where regional differences translated into legal differences. For instance *qāḍī* Yaḥya from Medina, when appointed to Baghdad at the beginning of the Abbasid reign, and despite his background as a skilled jurist, was overwhelmed by the legal differences he encountered in Iraq, which is why he requested judicial advice from his peer.[1949]

Decentralized scholarly circles also meant that their members, their curriculae, their teaching and writings were independent and not linked to caliphal power. They had an independent "teaching authority"[1950] that was not under the control of the caliphate. Learning circles and schools established autonomously, and were free from state-intereference; there was no state sponsorship or state-involvement in the teaching and studying of the law. Jurists interpreted, articulated, elaborated and transmitted Islamic

[1948] Bearman / Vogel, *Preface: The Islamic School of Law* (2008), p. x-xi; Hallaq, "From Regional to Personal Schools of Law?" (2001), pp. 1-26.
[1949] See Chapter Three, I.1.a.dd.
[1950] Makdisi, "Magisterium and Academic Freedom" (1990), p. 130.

law, i.e. Sharīʿa and jurisprudence (*fiqh*), independent of any official institution.[1951] These circles gave their members not only autonomy, but also made it possible for them to exclude all unwanted members, among these the philosophical theologians.[1952] Thus, unlike the judges, the scholars controlled their own affairs and memberships. This independence (from the caliph) and autonomy (in their scholarly decisions) crucially informed the status and authority of the scholar, especially vis-à-vis the judge.
By extension, throughout most of its history, the practice of *fatwā*-giving (*iftā'*) was largely independent of government interference.[1953] This is understandable given that *fatwās* are *per se* non-binding and thus create no legal validity other than the one given to it by the questioner (*mustaftī*) and those voluntarily following the fatwa. Given the esteem in which the *muftī* was held and the authority ascribed to him as part of the scholarly class discerning the law of God (see below), the *fatwā* was, despite its non-bindingness, a piece of law that attracted not only many Muslim individuals but also the interests of political authorities.

Despite the fact that scholars officially were not part of the centralizing efforts of the caliphs, and were in no formal way affiliated with the caliphate, it would be naive to think that political circles made no attempts to nevertheless influence the *fatwā* practice, co-opt scholars into their caliphal system or integrate scholars into the caliphal patronage system. At the same time, some scholars themselves actively sought to become part of central power by aligning themselves with political authorities. Thus, in fact three types of centralizing the *fatwā* practice were attempted: 1) through official recognition of *muftīs*, 2) through cooptation, and 3) through patronage.

b. Centralized State Authorization of *Fatwā*-Giving?

Though the function of giving *fatwās* is considered to be largely a private one[1954], i.e. without any state attachment, it seems that there was a particular form of official recognition. However, the precise nature of this recognition and the exact relationship between *muftīs*, *fatwā*-giving as institution and the state authorities is worth a debate,

[1951] Bearman/ Vogel, *Preface: The Islamic School of Law* (2008), p. viii.
[1952] Makdisi, "Magisterium and Academic Freedom" (1990), p. 130.
[1953] For the prominent exception of the Ottoman period, see for instance, Repp, *The Müfti of Istanbul* (1986).
[1954] On the private nature of fat*w*ā-giving, Motzki, "Religiöse Ratgebung" (1984), p. 13.

though the question of whether there was in fact a state authoritzation and *fatwā*-giving has barely achieved the attention it deserves. The (few) positions range from an official, even caliphal recognition (so *M.Q. Zaman*[1955]), yet largely leaving the *privatim* nature of *fatwā*-giving intact *and E. Nunè*[1956]), to the *muftī*-position, in addition to its nature as private activity for the qualified legal scholars, emerging also as one of civil (caliphal) servant nature, delegated and often salaried by the preceding Umayyad caliphs or governors (specifically *H. Motzki* for the 1st/7th century, and more generally Tyan for the 2nd/8th century).[1957]

Scholar of early Islamic history *H. Motzki* sees the appointment of a specialized, official personnel for *fatwā*-giving, serving the Muslim community, as a necessary delegation from the caliph, as an activity that was formerly practiced by the righteous caliphs themselves.[1958] Yet, because of the enormous expansion of the Muslim Empires and the growing ignorance of the caliphs given the increasing scope and complexity of the law, the caliphs were soon not capable of fulfilling all worldly tasks inherited from the Prophet.Within this context, not only the offices of the governor and the *qāḍī* developed as delegated tasks, but also that of the *muftī*.

As example, *H. Motzki* refers to the office of the *muftī* of Mecca that was created in the early 2nd/ 8th century through caliphal administration, possibly as life-long tenure.[1959] The position was held by leading scholars, possibly already prior to the 2nd/ 8th century. One such incumbent was legal scholar and ḥadīth expert ʿAṭāʾ b. Abī Rabaḥ who issued *fatwās* both to lay people and to learned people – unfortunately, we do not know if judges were amongst those requesting *fatwās* from him. ʿAṭāʾs activities as *muftī* in Mecca had an official character, as, so *H. Motzki* the office was probably based on a decree of the governor of the Umayyad caliph. Only ʿAta was allowed to issue *fatwās*, and in his absence, ʿAbdallāh b. Abī Najīḥ was authorized to act as *muftī*.[1960]

[1955] Zaman, *Religion and Politics* (1997), p. 174.
[1956] Nunè, "Il parere giuridico" (1944), p. 29.
[1957] Motzki, "Religiöse Ratgebung" (1994), p. 13 ; Tyan, *Histoire de l'organisation* (1960), p. 221.
[1958] Motzki, "Religöse Ratgebung" (1994), p. 13.
[1959] Motzki, *Die Anfänge der islamischen Jurisprudenz* (1991), p. 257.
[1960] Bukhārī, *Al-Tarīkh al-kabīr*, III /2, p. 464, Ibn Khallikān, *Wafayāt*, II, p. 424, Shirāzi, *Tabaqāt*, p. 69. Motzki, *Die Anfänge der islamischen Jurisprudenz* (1991), p. 257.

The public recognition, or license, was made public by the ruling authorities: A crier announced to the pilgrims in Mecca "that no one would give fatwās (*yuftī*) to the people except ʿAṭāʾb. Abī Rabaḥ, and in his absence ʿAbdallāh b. Abī Najīḥ."[1961]
Motzki also speaks of further legal scholars Mujāḥid and Ibn ʿAbbās who were incumbents of the office of *muftī* of Mecca at the end of the 1st/ 7th century.[1962] Also, Shāfiʿī's teacher, Abū Khālid Muslim b. Khālid is recorded as *muftī* of Mecca.[1963]

Was there a system of state licencing and state influence on the *iftā'*?[1964] And does this mean that the jurisconsult was not as independent as initially, and widely, assumed? Or as ascribed in the constitution of his authority? The Abbasids were, of course, not the first to seek their legitimacy in the support of legal scholars. Also, *fatwā* giving (*iftā'*) had been considered an important way of advancing the development of Islamic law. Thus, gaining support and steering the course of law through the official recognition of *muftīs* could have been important reasons for the ruling to seek a close relation to *muftīs*. Yet, beyond these Umayyad examples, the sources do not mention a state involvement in systematically licencing single jurisconsults. It might well be that the Umayyads granted particular approval to some jurisconsults in the early Islamic legal history; maybe because they thought it easier at the end of the 1st/7th century as there might have been only a handful of experts at that early time.

In contrast to Motzki, *M.Q. Zaman* describes the phenomenon not as based on a decree or license but more cautiously as an "official initiative to give some kind of a public

[1961] Al-Fasawī, *al-Ma'rifā*, I, p. 702; Ibn ʿAdī, *Ḍu'afā'*, I, p.52; see Muranyi, *Medinensiche Jurisprudenz*, p. 31, n. 58. Also see al-Maqrīzī, *Kitāb al-khiṭaṭ al- maqrīziyya*, IV, p. 143: ʿ Umar b. ʿAbd al-ʿAzīz "gave three individuals the authority to give fatwās: … Jaʿfar b. Rabīʿa,…Yazīd b. Abī Ḥabīb and ʿAbdallāh b. Abī Jaʿfar" cited and discussed in Tyan, *Histoire de l'organisation judiciare*, (1938), I, pp. 326; Zaman, *Religion and Politics* (1997), p. 149.
[1962] Motzki, *Die Anfänge der islamischen Jurisprudenz* (1991), p. 221, refering to Ibn Khallikan, *Wafayāt*, II, p. 423 for Mujāhid and to Abu Nuʿaim , *Hilya*, III, p.311 for the latter.
[1963] Nawawī, *Tahdhib al-asmāʾ wal-lughāt*, I, p. 19, as quoted and translated by Motzki, *Die Anfänge der islamischen Jurisprudenz* (1991), p. 261.
[1964] Licensing the issuance of legal opinion is a phenomenon known through the example of Roman law, when Emperor Hadrian restricted the right of giving legal opinions (*ius respondendi*). See for example, de Visscher, "Le "ius publice respondendi"" (1936), pp. 615-650; Siber, "Der Ausgangspunkt des "ius respondendi"" (1941), pp. 397-402; Schulz, *History of Roman Legal Scienc,* (1946), pp. 112-118; Kunkel, "Das Wesen des ius respondendi" (1948), pp. 423-457; Magdelain, "Ius respondendi" (1950), pp. 1-22; Daube "Hadrian's rescript to some ex-praetors" (1950), pp. 511-518; Schönbauer, "Zur Entwicklung des "ius publice respondendi" (1953), pp. 224-227; Kunkel, *Die Römischen Juristen: Herkunft und soziale Stellung* (1967), pp. 272-299; Wieacker, "Augustus und die Juristen seiner Zeit"(1969), pp. 331-349; Bretone, *Techniche e ideologie dei giuristi romani* (1982), pp. 241-254.

recognition" [1965] to certain prominent figures. If true, this is much less restricting than an official licensing.

Mālik b. Anas, almost certainly the most distinguished Medinan jurist of this day, is a prominent example of such caliphal recognition.[1966] At the pilgrimage of the year 148/766, the caliph proclaimed that no one would give *fatwās* to the people except Mālik b. Anas and ʿAbd al-ʿAzīz b. Abī Salama al- Mājishūn.[1967] The mutual benefits of these friendly relations were official approval and gifts for Mālik on the one side, and religious-legal legitimacy for the caliph on the other.[1968]

In another instructive report, caliph al-Manṣūr asked Mālik who from the prominent scholars (*mashāykha*) of Medina was known to give *fatwās*. Mālik is said to have named three: Ibn Abī Dhi'b, Ibn Abī Salama, and Ibn Abī Sabra.[1969] The authenticity of the story is unclear, but its portrayal of a caliph's concern to know who the leading scholars at any given time and place were, perhaps to patronize and co-opt them and/ or make sure of their loyalty to the regime, is likely.[1970] All three individuals were earlier in contact with Abbasid caliphs, and Ibn Abī Sabra even served as *qāḍī* under caliph al-Mahdī.[1971] The Abbasids may conceivably have been trying to co-opt these influential scholars, especially as both Ibn Abī Dhi'b and Ibn Abī Sabra had been involved or implicated against the Abbasid caliphate in the ʿAlid revolt of Muḥammad al-Nafs al-Zakiyya.[1972]

Despite this recognition from the highest official authority of the caliphat, *E. Tyan* cautions that it would be misleading to assume that *muftīs* were necessarily, or even regularly, official functionaries.[1973] Similarly, the later *adab al-mufti* literature insists on the *muftī* working as a servant of God, never accepting a salary, and presumbably not holding a regular office. The historical and biographical literature of this period occasionally uses the title of "*muftī* of a city" but gives no details on appointment or

[1965] Zaman, *Religion and Politics* (1997), p. 147.
[1966] Zaman, *Religion and Politics* (1997), p. 148.
[1967] Khatīb al-Baghdādi, *Ta'rīkh Baghdad*, X, p. 437 (nr. 5601).
[1968] Despite (or maybe because) Mālik having backed the ʿAlid revolt against the Abbasid rule through a fatwa, see Zaman, *Religion and Politics* (1997), p. 148.
[1969] Khatīb al-Baghdādī, *Ta'rīkh Baghdad*, XIV, p. 369 (nr. 7697).
[1970] Zaman, *Religion and Politics* (1997), p. 148.
[1971] Khatīb al-Baghdādi, *Ta'rīkh Baghdad*, XIV, pp. 369, 371.
[1972] See Zaman, *Religion and Politics* (1997), pp. 76-77.
[1973] Tyan, *Histoire de l'organisation*, (1938) I, p. 326.

jurisdiction, so that a regular office of muftī is to be almost certainly to be excluded.[1974] Official recognition or even a form of state-authorization as in licensing, i.e. regulating the *muftī's* activity, seems not widely spread. The *muftī's* activity was widely unrestrained.

That we do have instances of official recognition shows that there was a delicate line of acknowledgment and distance sought between scholars and the public authorities.
The significance of such proclamation is rather uncertain, though this report does seem to indicate an endorsement of the said scholars' position. Anecdotes that caliph al-Manṣūr also proposed to give the sanction of law to Mālik's Muwaṭṭāʿ underline the demonstration of an official recognition of a scholar's position.

c. Cooptation of Scholars into the State System?

Likewise, important normative writings on the scholars' role in the state favored an active role in the caliphate as religio-legal authorities. Legal scholars themselves, such as eminent Abū Yūsuf who became the first chief justice in Islamic legal history, favored a prominent role for scholars both in the judiciary and in administration and pleaded for a close relationship of the scholars with the state. In his treatise *Kitāb al-Kharāj* (Book on Taxes), commissioned by caliph Harūn al-Rashīd, he stressed that the administrative cadres be staffed by trusted, integer, and pious men. This can be read as an advice to recruit more people from scholarly circles, who were all associated with these qualities as they were dealing with the authoritative sources entailing Islamic law.[1975] Perhaps even more specifically, the advice could have referred to the Ḥanafīs, promoting Abū Yūsuf's own school of law. [1976]
The *ʿulamā's* participation in the administration is, for Abū Yūsuf the way to reform administrative abuses and a means through which the Sunna could be put into action. What seems equally important, in *M.Q. Zaman*'s reading of Abū Yūsuf, is that the involvement of those mastering law and religion would also give them a direct stake in the Abbasid state, and that would not only help the Abbasids with their religious prestige

[1974] Masud, "Ādāb al-Muftī", EI (3), p. 140-141.
[1975] Abū Yūsuf, *Kharāj*, pp. 204 (sec. 129), 247 (sec. 188, 189), 252 (sec. 198), 253 (sec. 200), 288 (sec. 220).
[1976] Zaman, *Religion and Politics* (1997), p. 101.

and legitimacy, but perhaps also mediate somewhat the autonomous position of the *ʿulamāʾ* in society about which the early Abbasids had some suspicions, depending on which side of the Abbasid revolution they stood.[1977]

Similarly, legal scholar and judge al-ʿAnbarī (d. 168/785) in his famous letter with advice to caliph al-Mahdī on the judicial system seems to assert an elevated position and authority of the religio-legal scholars in the Abbasid state, requesting that the caliph should have an advisory committee of legal scholars consulting him on caliphal affairs.[1978]
Both al-ʿAnbarī and Abū Yūsuf seem to affirm an active and key role for the scholar to engage in the shaping of the state, rather than taking the rather distant position of observer and critic.[1979]

These scholars seem to have been comfortable with the role provided for them by the caliphs.[1980] At least, the caliphs actively sought their proximity and bond, for example when the caliph asked scholar Mālik b. Anas to codify the law rather than himself providing for a central law. Also, with making Abū Yūsuf chief justice and thereby a member of the official establishment, as well as having him as well as Shāfiʿī and Mālik write under caliphal patronage, both seem to have been comfortable with accommodating and affirming the scholars' authority within the political elite thinking.[1981]
Likewise, caliphal secretary Ibn al-Muqaffa' makes it clear that he considers the religious-legal scholars as functionaries of the state that should be co-opted into the state apparatus. [1982] Serving as the caliph's companions (*ṣahāba*) is one of the functions he had in mind for them.[1983]

The role of legal scholars into the state system can be described as one of cooptation.

[1977] Zaman, *Religion and Politics* (1997), p. 101.
[1978] On al-ʿAnbarī's letter see Chapter Two, II.3. See also Zaman, *Religion and Politics* (1997), pp. 91, 101-106.
[1979] Zaman, *Religion and Politics* (1997), p. 101.
[1980] Zaman, *Religion and Politics* (1997), p. 102.
[1981] Zaman, *Religion and Politics* (1997), p. 102.
[1982] Ibn Muqaffa', *Risāla*, pp. 61, 63, para.55. Together with Zaman, *Religion and Politics* (1997), p. 102, I take it that what Ibn Muqaffa' means with " ahl al fiqh wa'l sunna wa'l siyār wa'l-naṣīḥa" (people of jurisprudence and Sunna and international law and politics, and of advice) are the religious-legal scholars, or at least includes them.
[1983] Ibn Muqaffa', *Risāla*, p. 57, para 49.

By extension, scholars were also co-opted into the judicial system, possibly leaving enough room for their want for indepencence whilest integrating them into the judicial system to standardize and unify the law across large parts of the Empire.[1984] In the absence of codification, co-optation could have served as a means to standardize the law. Co-option and consultation functioned similarly as a means to make legal scholars, though not formally, yet effectively part of the judiciary.

Significantly, co-optation reflects a particular idea of authority. Co-optation permits to keep the competitors for authority in proximity to each other and thus minimize the dangers of their authority harming the own one. [1985] In contrast to cooperation, co-optation attempts to incorporate the officer into the bureaucratic hierarchy and provides the officer with authority over colleagues. In cooperation, the officer represents the body of colleagues to the bureaucracy but is only *primus inter pares* in the collegium.[1986] In Chapter Three we have encountered examples of cooptation of legal scholars into the judiciary: scholars of law were kept close to the judiciary and given a (elevated) word in determining adjudication.[1987]

N.Tsafrir argues that refusal to be coopted into the State apparatus largely corresponded with the status of prominence within a city. Thus, the more prominent a particular school of thought was within a city, the more likely it was, that its adherence would refuse government positions, as a sign to refuse government control over the scholars and their affairs. In contrast, by agreeing to serve in an office under the government, a scholar recognized its control.[1988] Uninfluential circles, probably like the Ḥanafīs in cities like Kufa, Iraq in the second/eighth century, could and did thus accept positions in the judiciary and gain an advantage over other schools.[1989]

[1984] See also Chapter Three, III where the standardizing effect of jurisconsults in adjudication is analysed.
[1985] Instead of cooptation, Badry speaks of mobilization, harmonization and integration which I consider important elements of cooptation, Badry, *Die zeitgenössiche Diskussion* (1998), p. 81.
[1986] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 962.
[1987] Jurisconsult Mālik ibn Anas effected adjudication of judge Mufaḍḍal, and judge Bakkār kept two local jurisconsults as close allies whose advice he followed repeatedly.On judge Mufaḍḍal and jurisconsult Mālik b. Anas, see Chapter Three, I.3.c., d. On judge Bakkār and the two local jurisconsults, see Chapter Three, I.1.b.
[1988] Tsafrir, *The History* (2004), pp. 26-27.
[1989] Tsafrir, *The History* (2004), p. 27.

Refusing to become co-opted could be ambivalent. Famously, Abū Ḥanīfa was said to have endured torture and imprisonment for his refusals to become *qāḍī*[1990], yet nevertheless cooperated by, for example, giving legal advice at the request of caliph al-Manṣūr.[1991] As a matter of principle, however, many early sources for the early history of judges open with Prophetic warnings against judging.[1992] The refusal to become judge has been seen as an unwillingness on the part of many jurists to collude with a corrupt government apparatus; it was part of their moral anxieties surrounding judging in accordance with Islamic law.

These decisions to keep away from the State were also a shield against encroachments of the political authorities on their own field of competence, as the jurists regarded themselves to be more able interpreters of Islamic law[1993], if they were left to do so independently.

d. Patronage

A further centralizing element affecting the scholars during early Abbasid reign was the system of patronage. For *R. Saller*, historian of ancient Rome, three elements are necessary to distinguish a patronage relationship. [1994] First, it requires a reciprocal exchange of goods and services. Secondly, the relationship must be of a personal nature one of some duration, to distinguish it from a merely commercial transaction. Third, it is necessarily asymmetrical: two parties are of unequal status (unlike the status of friendship between equals) and offer different kinds of goods and services in the exchange.

[1990] For a discussion of this and his opposition toward the ruling authorities and censure of judges like his rival Ibn Abī Laylā who cooperated with them, see Yanagihashi, "Abū Ḥanīfa," *EI*3 (2009) who follows the theory of Schacht and van Ess that Abū Ḥanīfa was tortured for refusing the judgeship a second time or because of Abū Ḥanīfa's incautious remarks made against the Abbasid caliph al-Manṣūr during the ʿAlīd revolt in 145/762 headed by Nafs al-Zakiyya and his brother Ibrāhīm, see Schacht, "Abū Ḥanīfa," *EI*2, I, p.123.

[1991] On this and further examples of Abū Ḥanīfa also cooperating with the ruling authorities and providing legal advice see Tsafrir, *The History of an Islamic School* (2004), p. 25. Tsafrir nevertheless regards Abū Ḥanīfa "by no means the model of an obedient subject".

[1992] See for example Wakīʿ, *Akhbār al-quḍāt*, I, pp. 19-61, the first chapter preceding biographical reports on judges, beginning with the "[section] mentioning [*ḥadīth* and other] reports announcing the gravity of assuming a judicial post over people and that whoever assumes [such a post] has been slaughtered without a knife: *dhikr mā jāʾa fī ʾl-tashdīd fī-man waliya ʾl-qaḍāʾ bayn al-nās wa-anna man waliyah fa-qad dhubiḥa bi-ghayr sikkīn*"). See also Khaṣṣāf, *Adab al-qāḍī*, pp. 20-35; on the anxiety and burden of adjudication see Chapter Two, IV.

[1993] Rabb, *Doubt's Benefit* (2009), pp. 113-114.

[1994] Saller, *Personal Patronage* (2002), p. 1 refering to the definition of patronage used by Gellner, "Patrons and Clients" (1977), p. 1-6. On "patronage as a fact of life" for "important men", see Brown, "The Rise and Function of the Holy Man", (1971), p. 85

Under the Abbasids, a system of patronage was systematically established, granting gifts and money to scholars, as well as judicial appointments which secured the jurist a monthly income. Legal scholars depended on royal and government patronage, a major contributor to their financial well-being, if they could not sustain themselves through additional jobs. They were often paid handsome salaries when appointed to a judgeship, but they also received generous grants as private scholars. On the other hand, the government was in continuous need of legitimization, which it found in circles of the legal profession. [1995]

Gifts and presents seem not to have been a rare exception: Shāfiʿī wrote his famous treatise *al-Risāla*, in which he defended legal diversity in the form of *ikhtilāf* on the request of caliph Mahdī.[1996] Caliph al-Harūn commissioned jurist Abū Yūsuf with the writing of the Book of Taxes (Kitāb al- Kharāj) and financially compensated him for these scholarly efforts. Caliph al-Manṣūr is documented to have given presents to jurist Mālik[1997], Mālik nevertheless turned down the caliph's wish to present a unified law for all of the Empire.

Another instance of caliphal recognition of *muftī*-scholars in the form of patronage is provided by the example of Al-Layth b. Saʿd (d. 175/791), a leading jurist of his time and certainly the most influential of Egyptian scholars. We had already come across his influence and authority to have a judge removed from office by the caliph when he had applied law other than Mālikī law, especially in the case of property law.[1998] In deed, he enjoyed the patronage of three successive caliphs, al-Manṣūr, al-Mahdī and Hārūn al-Rashīd, and it was to this consecutive patronage that at least some of his outstanding wealth must have been due.[1999] Thanks to the recognition accorded him by successive caliphs, he was able to exert his influence on- and if necessary, against- the provincial governor or the *qāḍī*.[2000] He is said to have been "alone in his time to give *fatwās* in Egypt".[2001]

[1995] Zaman, *Religion and Politics* (1997), p. 101; Hallaq, "Juristic Authority vs. State Power" (2004), p. 252.

[1996] On Shāfiʿī justifying legal diversity in the form of *ikhtilāf,* see also Calder, "Ikthilāf and Ijmāʿ in Shāfiʿī's Risāla" (1983), pp. 55-81.

[1997] Ibn Saʿd, *Al-Tabaqāt al-kubrā, al-qism al-mutammim*, p. 440.

[1998] On jurisconsult al-Layth b. Saʿd's authority on adjudication, Chapter Three, I.2.b. aa.

[1999] Khatīb al-Baghdādi, *Ta'rīkh Baghdad*, XIII, p. 5; Khoury, "al-Layth b. Saʿd" (1981), pp. 191-192

[2000] Kindī, *Kitāb al-Wulāh*, pp. 372-373; Khatīb al-Baghdādi, *Ta'rīkh Baghdad*, XIII, p. 9; Khoury, "al-Layth b. Saʿd", p. 192.

[2001] Ibn Saʿd, *al- Ṭabaqāt*, VII, 517 ("… wa kāna qad istaqalla bi'l fatwā fi zamānihi bi-miṣr")

Al-Layth is even said to have reprimanded a preacher in a mosque in Egypt for giving sermons without his permission.[2002] This would illustrate al-Layth's authority and supervision of life in his homeland Egypt, which is, so *M.Q. Zaman*, what scholars who were officially patronized might have been expected to do.[2003]
Dealing with the delicate balance of maintaining scholarly independence in deliberating and writing whilest being in proximity to the highest state authority and accepting presents thus was not particular of scholars of one school only.

The effect of state patronage on the nascent schools is particulary visible in the case of the Ḥanafī example. State patronage was a crucial means in supporting the juristic endeavors especially in Iraq, leading to an increasing spread of the school later known as Ḥanafī.[2004] For example, some scholars in Basra, Iraq enjoyed the monetary support of the government. If Ḥanafī scholars were to become teachers in Basra, they would be competing for those same monies. Evidence exists of at least two occasions on which government money went to Ḥanafī scholars of Basra. Caliph al-Maʾmūn (r. 193-218/ 813-833) sent money to legal scholar Muḥammad b. ʿAbdallāh al-Anṣārī, ordering him to distribute it among the jurists of Basra. Al-Anṣārī, adherent of the early Ḥanafī school,[2005] distributed the money among students of his study-circle alone.[2006] On another occasion, jurist Al-Anṣārī and the Ḥanafī judge ʿUmar b. Ḥabīb were included in a delegation of Basrans to the caliph whose members were granted money before their departure from Basra.[2007] The fact that money assigned by the government to Basran scholars went to Ḥanafī scholars in the first place may point to the government's attempt to advance Ḥanafism in scholarship, and later in the judiciary.

[2002] Khatīb al-Baghdādi, *Ta'rīkh Baghdad*, XIII, pp. 73f. (nr. 7052), see Zaman, *Religion and Politics* (1997), p. 150.
[2003] Zaman, *Religion and Politics* (1997), p. 150. Further prominent examples of close interactions between scholars and early Abbasid caliphal officials, besides the well known example of Abū Yūsuf and caliph Hārūn al-Rashīd are the scholars and later judges Ibn Shubruma (d. 144/761) and Ibn Abī Laylā (d. 148/765) both of whom had close relations with the second Abbasid caliph Abū Jaʿfar al-Manṣūr (r. 136-158/754-775) and his nephew ʿĪsā b. Mūsā who governed in Kufa. Ibn Abī Laylā's close relation to the governor of Kufā isprobably what allowed qāḍī Ibn Abī Layla to have the governor forbid Abū Ḥanīfa from issuing fatwas against the qāḍī and his verdicts. On the dispute between Ibn Abī Laylā and Abū Ḥanīfa, see Chapter Two I. 1.c.
[2004] Tsafrir, *The History* (2004), pp. 17-60, esp. p. 27, 34.
[2005] On al-Anṣārī, see Chapter Two, p. 23.
[2006] Khatīb al-Baghdādi, *Ta'rīkh Baghdād*, V, p. 409; Dhahabī, *Siyar*, IX, p. 536; Tsafrir, *The History* (2004), p. 34.
[2007] Wakīʾ, *Akhbār al-quḍāt*, II, p. 152.

Patronage came with a package of political concessions. Those who benefited from patronage were scholars associated with the articulation of early Sunni trends, as Shiʿa opposition to the Abbasids was manifesting. [2008] But these proto-Sunni trends were also a strong concordance in both the interests of the caliphs and the emerging Sunni elite. This convergence might also help to understand why some scholars became supportive of the Abbasid caliphate.[2009]

Though patronage seems to have been a regular phenomenon, it was not as strong as to control the hierarchical positions and appointments of scholars within the schools or to impact for example the curriculum (with the later exception of the theological question of the createdness of the Qur'ān). Neither did the caliphs succeed, or even attempt to bureaucratize the scholars, so that the schools of law instead of loosing ground in their encounters with the rulers, instead rather gained more weight and kept enjoying high prestige.[2010]

e. Caliphal Preferences for Particular Schools of Law

Though there was no interference of the caliphate into the establishment, doctrines and teachings of the schools, there was nevertheless preference for a school, first for the Medinan school of Mālik, later for the Ḥanafī school. This affinity gradually translated into a school preference for the appointment of judges.

As the first two Abbasid caliphs were not from Iraq, and not accostumed to their (firmly established) legal tradition, their turn to Medinan law might well be because of familiarity with Medinan law and the high legal prestige of the Medinese, as well as their political unlikeliness to rebel against the Abbasids. It was only under caliph al-Mahdī that caliphal power turned more resolutely to the Iraqi jurists, be it because the new Abbassid generation emerged more sensitive to local legal features, or because they attempted to get closer to the legal scholars of the province.[2011]

[2008] Zaman, *Religion and Politics* (1997), p. 12.
[2009] Zaman, *Religion and Politics* (1997), p. 12.
[2010] Patronage had a different result in medieval Damascus of the 11th and 12th century, were the schools of law lost ground vis-à-vis the rulers because of patronage, see Gilbert, "Institutionalization of Muslim Scholarship" (1980), p. 131.
[2011] Tsafrir, *The History* (2004), p. 40. More on the early Abbasid inclination to the law of Medina before their Ḥanafī preference, Hallaq, *Origin* (2005), pp. 105-106; Tillier, *Les Cadis* (2009), pp. 149-150; Kassessbeh, *The Office of Qāḍī* (1990), p. 77.

Later inclinations towards the Ḥanafī school are also ascribed to Abū Yūsuf as first *qāḍī al-quḍāt*. *N.Tsafrir* however assumes that the Ḥanafī chief justice was was not the cause but rather a consequence of an already emerging Abbasid preference for the Ḥanafis.[2012] The preference for Ḥanafī teachings gradually translated into a Ḥanafī dominance on the Iraqi judicial stage. With the exception of Baghdad, where the caliphs were free to appoint any judge they preferred in their newly created capital, the circle of Abū Ḥanīfa and his adherents was not imposed on the local populations by Abbasid judicial policy, but came with an increasing of adherents, very probably due to the (monetary) support which was granted to them by the central power. Hanafism benefited from patronage: the early Ḥanafī scholars were welcomed at the imperial court and found perspectives for a future which the supporters of other teachings benefited from much less. [2013] In fact, the *qāḍī al-quḍāt* was seen as symbol of integrating, or even coopting, *ʿulamāʾ* in central power.[2014] Ḥanafī connections at court were most helpful in procuring their followers positions of *qāḍīs* which in turn resulted in attracting many scholars to their circles of teaching.[2015]

Caliphal school preference contributed to enlarge the impact of the benefitting scholars and the spreading of their teachings. This preference aided to enlarge the authority of some scholars over others, and, in some cases, even over some judges, as Chapter Three has evidenced. The popularity of a particular school both amongst the caliphs and the respective region also influenced also the make-up of the judiciary. This does not mean that the regional school preference of the jurisconsults and the judges necessarily concurred. Instead, there are are examples of Ḥanafīs being appointed to Mālikī-inspired Egypt and Mālikis appointed to Ḥanafī-informed Iraq. This created conflictual situations with questions arising on who had the higher authority in questions of particularly sensitive legal issues, like property and testimony law, a matter discussed in Chapter Three. School authority seems to have been important for the individual reputation of the scholar especially when it came to gathering community support for his position which in turned strengthened his position before the caliph- all this could prove to be decisive in the scholar's argument with the judge.

[2012] Non-Ḥanafī Basran judge Muʿādh b. Muʿādh was appointed even against strong opposition from chief justice Abū Yūsuf,Khatīb al-Baghdādi, *Taʾrīkh Baghdad*, VIII, p. 78; Tsafrir, *The History* (2004), p. 21-22.
[2013] Tillier, *Les Cadis* (2009), p. 186.
[2014] Tillier, *Les Cadis* (2009), p. 430.
[2015] Tsafrir, *The History* (2004), p. 118.

f. Struggle over Authority between Scholars and Caliphs: The Miḥna

Defining the relationship between the scholars (*ʿulamāʾ*) and the caliphs remains a controversial one, spanning from uncompromising animosity of the scholars towards the caliphs and their Empires, to caliphal cooptation and even subordination of the scholars. The scholars' rising authority caused a reaction by the caliphs, and might explain, at least in part, the *miḥna*, the state doctrine of the createdness of the Qur'ān adopted by caliph al-Ma'mūn (r. 196-217/812-833).[2016] It was in particular the rationalist philosophical faction of the Muʿtazila, which had many supporters amongst the Ḥanafīs, who espoused the doctrine of the createdness of the Qur'ān, and instituted a tribunal for those who rejected this doctrine, especially the textualists. Many Ḥanafīs thus sided with the official state dogma, and could thus create a proximity to the Abbasid caliphate. Ultimately, however, this dispute was about whether the State or the scholars would wield ultimate authority. Numerous scholars were perceived as claiming to be the proper interpreters of Islam and as taking away power from the central political authorities. The miḥna dispute was thus eventually a question of authority in the constitutional arena.[2017]

Several perspectives on the caliphs' relationship with the scholars (*ʿulamāʾ*) have emerged in the literature: *Lambton* sees that scholars were largely independent of central caliphal policies and could act, thanks to their epistemological knowledge and authority, autonomously of the caliph.[2018] *P. Crone* and *M. Hinds* see the caliphs attempting to trump the scholars' authority, claiming in particular religious and legal authority over and above the *'ulamāʾ,* not willing to subordinate caliphal authority to anyone else. [2019] *M.Q. Zaman* in his latest research however rather sees evidence in a cooperation of caliphs and *ʿulamāʾ*. He argues that caliph al-Ma'mūn's *miḥna* ought to be seen not as the culmination of a struggle over religious authority between the caliphs and the scholars (*'ulamāʾ)*, but only as an interregnum which disturbed but did not destroy, and in its failure only reaffirmed, the earlier, balanced pattern of state-*'ulamāʾ* relations.

[2016] No cases could be found where the *miḥna* created conflicts of authority between judge and jurisconsults.
On the *miḥna* and its effect on the state functionaries such as the appointment and politicization of the judiciary see Chapter Four, I.1.a.aa.
[2017] Bearman/Vogel, *The Islamic School of Law* (2005), p. xi.
[2018] Lambton, *State and Government* (1981) p. 43.
[2019] Crone/Hinds, *God's Caliphs* (1986).

These three views, namely scholary independence from the State, scholars' subordination to the State, or a cooperation between scholars and the State, have since been continuously debated. The examples of legal scholars influencing and regularly suceeding with the appointment and removal of judges, shows that the scholars seem to have had a pragmatic approach to the State authorities, making use of them when they needed them for their own interests. The examples of the jurisconsults in the mazālim court (courts of appeal) also showed that the scholars knew when to keep a low profile when the caliph, in return, made use of the scholars to uplift his authority.

g. Conclusion

The role of the jurists towards the State was ambivalent. They were part of the elite, especially when they chose to work closely with the State as judges, caliphal advisors or commissioned authors, and yet many of them were largely separate from government.
Though there was certainly overlap between juristic and political arenas, it seems a fair assessment that jurists who worked with the political authorities and played an active part in their policies were a minority.[2020] Instead, and as laid out in Chapter Two, many who were nominated for the judiciary preferred to remain separate from the State apparatus.[2021]

Scholarly independence was an important theme around which much of the professional self-image of the legal scholars rested and which contributed to ascribe to them an authority that largely rests on the scholars' critical distance to the powerful.
Unlike the judges, the scholars benefited from the idea that they were seen as detached from the state, and thus from coercion, corruption, and worldly weaknesses, such as money and power through obscure associations with political circles. This ascription enhanced not only the scholars' legal authority but also their moral authority.[2022]

But this picture does only to a certain extent reflect the picture that legal scholars had with the State. While the topoi of fear of (moral and financial) corruption as well as the

[2020] Rabb, *Doubt's Benefit* (2009), p. 113.
[2021] On the burden of adjudication as theme for refusing government position, especially the judiciary, see Chapter Two, IV.
[2022] Hallaq, "Juristic Authority vs. State Power" (2003-2004), p. 249.

warnings regarding the burden of adjudication were recurring, some scholars considered the monthly payment they could earn as judiciary to pay their and their families living as quite attractive. Other scholars profited from caliphal patronage of scholars through stipends and gifts. The idea of scholars acting independently from the State, thus, was one that can be not entirely upheld.

However, only a minority of jurists, judges and jurisconsults, worked with or was even instrumentalized by the political authorities.[2023] The picture which emerges reveals both an effort to maintain scholarly independence from the political circles and their financial temptations and promises of political power, as well as a pattern of collaboration between the caliphs and the *'ulamā'*, partly actively sought by the scholars, partly as a political design by the political authorities who needed the scholars involvement in their political plans for reasons of legitimacy.

Though centralizing efforts of control over scholars took place (through official recognition, cooptation, patronage or a caliphal school preference), aiming at binding the scholars to the ruling authorities, the (primary and secondary) literature does not see these efforts to have tainted the overall picture of scholars. Literature largely refers to the scholars as men of independence, piety, integrity, guided by their knowledge of what is right and what is wrong. Many *muftīs* sought to remain and succeeded in remaining largely independent because individuals (judges or laypeople) were free to choose their authorities when requesting *fatwās* and because a muftī who kept his distance from the government gained prestige among ordinary Muslims. The independence of the *muftī* was a significant part of the formation and persistence of a mostly independent community of jurists.[2024] It remains accurate to say that Islamic law was a system that operated outside of "state" and government influence. [2025]

Scholars, particularly those who benefited from their imperial contacts and the patronage system and were heard by the caliph, could thus surely more easily achieve a quasi-coercive intervention against or in favor of a judge. Legal scholars built their authority as

[2023] See also Rabb, *Doubt's Benefit* (2009), p. 113.
[2024] Mottahedeh, Introduction: *Lessons in Islamic Jurisprudence* (2003), pp. 7-8.
[2025] Hallaq, "Juristic Authority vs. State Power" (2003-2004), p. 249.

both in opposition and in cooperation to the caliph, dispensing legal advice and formulating own legal ideas.[2026]

2. Professionalization of an Expertocracy

The details and the periodization of the professionalization of Muslim legal experts are a matter of debate. It is undisputed, however, that Muslim legal scholars did in fact undergo a process of professionalization between the 8th and 10th century.[2027] While many Islamic law scholars employ "professionalization" to describe the diverse school formations in different cities of the Muslim Empire, none has used the criteria put forward by scholars of professionalization theories.[2028] What follows here cannot do justice to the diverse historical settings of professionalizations but is an attempt to structurally compare the professionalization of the scholarly class with that of the judiciary.

As already discussed, professionalization does not know a unanimous number of criteria.[2029] However, as an agreed minimum, professionalization fundamentally rests on differentiation and specialization from other occupations.[2030] Differentiation appeared from an early age, namely when a class of religio-legal scholars emerged whose prime engagement was with authoritative texts. These scholars (pl.ʿ*ulamāʾ*, sg.ʿ*ālim*) derive their name from the Arabic term *ʿilm*, knowledge, which is relevant to law and religion.[2031] This is significant in that the ʿ*ulamāʾ* derive authority, and power, from their knowledge which sets them apart, differentiates them from other professional experts in the field of law.[2032] Scholars' specialization developed in parallel to the tasks of serving

[2026] Bearman /Vogel, *The Islamic School of Law* (2005), p. x.
[2027] See, e.g. Johansen, "Truth and Validity" (1997), p. 22, note 15; Melchert, "The Piety of the Ḥadith Folks" (2002), p. 426, with reference to ḥadīth scholars, and confirming Hodgson, *Venture of Islam* (1974), I, p. 238.
[2028] Having said this, Islamic legal scholars have put forward detailed work of how scholars, their learning circles, later schools have established rules and regulations that, taken together, support the professionalization theory, see Melchert, The Formation of the Sunni Schools (1997); and for slightly later periods see Berkey, *Popular Preaching and Religious Authority (2001), Chamberlain, Knowledge and Social Practice* (1994). More precisely, though, the emphasis is on institutionalization of the scholarly field. See also Romanov, "Toward Abstract Models for Islamic History" (2013) n.p.
[2029] For the range of criteria for professions from two (*H.A. Hesse*) to six (*G. Dilcher*), see Chapter Four, I.2.
[2030] Generally on professionalization, see Chapter Four, I.2.
[2031] On the meaning of *ʿilm* (knowledge) for the eligibility of judges, see Chapter Two, V.1.a.
[2032] See further legal actors in the institutional setting of early Islamic legal history, Chapter Four, I. 2.a.bb. On legal professions deriving power from knowledge, Rüschemeyer, "Comparing Legal Professions" (1986), p. 443.

the Muslim community with responses to the emerging needs of real life and their compatibility with religious prescriptions.[2033]

Beyond differentiation and specialization, the professionalization of scholars is particular in several ways, and the criteria of professionalization need to be adapted accordingly. The skills of teaching and of research in what *T. Parsons* calls the "pure" intellectual disciplines are to be counted as a profession, though they do not always exclusively serve the applicability to the needs of society but are rather of a theoretical nature.[2034] Also, the scholarly field is often individualized, particularly in the way how and to what end scholars work. Next to the individual expert's professionalization, I shall additionally refer to the principle of collegiality as it brings together highly individualized persons with specialized expert knowledge. Authority is therefore assessed both via the professionalization of the individual scholar as well as via the collectivity of scholars as a joint group of persons. Scholars act and benefit from both the invidual and collective dimension of their workings. The community of scholars is an "interpretive community"[2035] and has its interpretive authority centred on specific interpreters and specific texts, producing argument, agreement and conflict.[2036] This authority functions both in their individual capacity as a scholar but also collectively as part of the community of scholars, the nascent schools of law (*madhhab*) or study-circles (*ḥalaqa*). Collective scholarly authority, as has been demonstrated in the delegation of jurisconsults to the caliph influencing the make-up of the judiciary has provided particularly successful when they spoke with one unanimous voice.[2037]

a. Tasks

The professional activities of scholars engaged with the authoritative texts focused on teaching and issuing *fatwās*.[2038] Both activities contributed to the advancement, systematization and institutionalization of knowledge in the study-circles and emerging schools of law. Professionalization of scholars is connected to guiding others to

[2033] Motzki, "Religöse Ratgebung" (1994), p. 13.
[2034] Parsons, "Professions" (1968), p. 536.
[2035] Fish, *Is there a text in this class? : the authority of interpretive communities* (1980), pp. 147-174, also cited by Messick, "Madhhabs and Modernities" (2006), p. 159.
[2036] Messick, "Madhhabs and Modernities", (2006), p. 159.
[2037] See the successful second delegation from Basra to caliph requesting the removal of the old and appointment of the new judge, Chapter Three, I. 2.a.cc.
[2038] On teaching and *fatwā*-giving as joint task of scholars, Motzki, "Religiöse Ratgebung" (1994), p. 13; Jackson, *Islamic Law and the State* (1996), p. 69.

knowledge (*Wissensbefähigung*).[2039] The *muftī* profession was thus clearly a "profession of learning", organized in terms of two primary functions: contributing further to learning through research and scholarship, and transmitting the learning to others.[2040]
This is particularly true for the formative period is marked by a rising development, diversity, and production of Islamic legal works.[2041] Pursueing and disseminatig religio-legal knowledge was key in how scholars understood their activities. They thus had a "teaching authority" and a "*fatwā*-giving authority", a dual authority granted by the authorization of their social communities.

In their task of giving legal opinions, the jurisconsult needed intellectual capacities. The jurisconsult, in arriving at his opinion, did so on the basis of his individual research (*ijtihād*), based on his interpretation of the sources.[2042] In principle, every jurisconsult performed his task alone, not as part of a committee of jurisconsults, though the result of his research could well be in agreement with that of another, or others, on the same question. He was not bound by the opinions of any jurisconsults, past or present, not even those affiliated to his own school of law.[2043] Not only was he free and independent to practice his research and proclaim his findings, he was encouraged to do so by a promise of reward in the Hereafter.[2044] A prophetic tradition (*ḥadīth*) rewarded the jurisconsult for his research, even if eventually he was proven to be right. Another such tradition held every jurisconsult to be wrong, in the sense that he had conscientiously engaged with the law to the best of his ability.[2045]

b. Educational Training in the Nascent Schools of Law

The *muftī* career is based on a knowledge-based professionalization.
The grand jurist Shāfiʿī (d. 820) enumerates the branches of knowledge in which one must be proficient in order to qualify as a *muftī*. These fields of knowledge are precisely those in which the *mujtahid* (the jurist of highest rank) must be proficient, and they include knowledge of the Qur'ān, of the Prophet's Sunna, the Arabic language, the legal

[2039] Rüschemeyer, "Professionalisierung" (1980), p. 311.
[2040] Generally on the professions of scholars, Parsons, "Professions" (1968), p. 539.
[2041] See e.g. Johansen, "Truth and Validity" (1997), pp. 4-5.; See Hallaq, *Origins* (2005), p. 126 on the internationalization of Islamic legal scholarship due to the mobility of scholars.
[2042] Makdisi, "Magisterium and Academic Freedom" (1990), p. 122.
[2043] Makdisi, "Magisterium and Academic Freedom" (1990), p. 123.
[2044] See reward in the Hereafter for reasoning the law, see Chapter Two, IV.
[2045] Makdisi, "Magisterium and Academic Freedom" (1990), p. 123.

questions subject to consensus, and the art of interpretive legal reasoning (especially analogy).[2046] Recognizing the process of branching of the religious-legal learning into specific disciplines serves as a good indicator of professionalization.[2047] Empirically speaking, we have no information as to a special curriculum for the education of a *muftī.*[2048] We know that students were specifically trained in the learning circles to answer questions of requesters approaching them, with the teacher present to motivate and supervise the answer. For instance, right after the death of the Prophet, student al-Ḥajjāj who attended the classes of Zayd b. Thābit was encouraged by his teacher Zayd to answer the question of questioner Ibn Qahd on whether his wives and concubines were permitted to use contraceptives if he did not want them to become pregnant. Ibn Ḥajjāj, encouraged by his teacher to answer, affirmed the lawful use of contraceptives, referring to Qur'ānic verse 2: 223, adding that this was not his own opinion but what he had previously heard his teacher saying. His answer was confirmed by his teacher Zayd. [2049] The question-answer scheme and the engagement with authoritative texts were thus part of early education.

From these study circles emerged the early grand generations of scholars that influenced the development of Islamic jurisprudence from the first century of Islam onwards. The teachers were not only explicitly called *muftīs* but the sources also refer to their teachings as having included many *fatwās* from as early as the 1/7 and 2/8 Islamic century.[2050] It seems an accepted fact that the disciplines of legal learning mentioned above by Shafiʿī belong to the foundations of the education of any (legal) scholar of that time.[2051] The education of the judges and the legal scholar thus were not different.[2052]

Expert occupations in the academy usually go along with an institutionalization of the academy.[2053] Similarly, the rise of the scholars (*ʿulamā')* was intimately connected to the

[2046] Shāfiʿī, *Kitāb al-umm*, VI, p. 219, VII, p. 274; Hallaq, "Ifta' and Ijtihad in Sunni Legal Theory", (1996), p. 33. Shāfiʿī, *Kitāb Ibṭāl al-Istiḥṣān*, pp. 492, 497; Hallaq, *Authority* (2001), p. 66. See also Chapter Two, for futher scholarly discussions on the eligibility and qualifications of the jurisconsult.
[2047] Romanov, "Toward Abstract Models for Islamic History" (2013) n.p.
[2048] Masud, "Ādāb al-Muftī", EI (3), p. 135.
[2049] Mālik, Muwaṭṭaʿ, 29: 99; Motzki, "Religöse Ratgebung", (1994), p. 12-13.
[2050] See the teachings of ʿAbdarrazzāq, *Muṣannaf*, Ibn Abī Shayba, *Muṣannaf*, Motzki, *Die Anfänge islamischer Jurisprudenz* (1991), p. 257, Motzki, "Religiöse Ratgebung" (1994), p. 13.
[2051] Vogel, *Islamic Legal Systems* (2000), p.58; Ahmed, *Muslim Education* (1968), p.48.
[2052] See the education of the jurist-judge, Chapter Four, I.2.b.
[2053] Rüschemeyer, "Professionalisierung" (1980), p. 311.

emergence of a pivotal legal institution, the school of law (*madhhab)*.[2054] In the *madhhab* as institutional entity Islamic jurisprudence (*fiqh*) and its institutions and personal networks of learning came together and formed a dominant place in scholarly self-definition.[2055] These schools, and no less their preceding study-circles as they embody nascent schools of law, were seminal in establishing legal authority.[2056]

Scholars produced legal material creating debates between jurists within one school and between those of different schools. Dissent was therefore foundational for the establishing auf authority in the field of Islamic normativity. It was dissent with other scholars that enabled the defense of old and the establishment of new positions and interpretations.[2057] The professionalization of the scholarly field evolved thus along the production and generating of knowledge, and was therefore a knowledge-based professionalization. The scholar's authority was established through the engagement with authoritative texts, in turn contributing to the understanding and canon of the law, with the ultimate aim to discern divine commands for the Muslim community.[2058]

The study circles, and later schools had an equally important role to play in the professionalization process.[2059] Having said this, the main difference between the schools and the study-circles are the marked lines of the first in questions of doctrine, principles and methods propounded by its scholars. The latter was still more fluid and allowed for more legal pluralism amongst the scholars and amongst the study-circles. The school comprises a group of people who study a common doctrine or accept the same teachings or follow the same intellectual methods[2060]- the nascent schools show early sign of this homogeneity that makes it possible to assign or scholars to nascent schools and their doctrines, or that justify the self-designated of adherence. So when jurists were described as friends or adherents of Abū Ḥanīfa or Shāfiʿī (*aṣḥāb Abī Ḥanīfa* or *aṣḥāb al-Shāfiʿī*) as was often the case in our sources of the formative period, this adherence to the doctrines and teachings of Abū Ḥanīfa can legitimately be used as laying the ground for a nascent school. This categorization also shows that the authority of an individual

[2054] On the development of the school, and the difficulty of categorizing schools of law during the second and third century, see above, on the qādi's education and training in the nascent schools of law, Chapter Four, I.2.b.
[2055] Berkey, *Popular Preaching and Religious Authority* (2001), p. 89.
[2056] Bearman/ Vogel, *The Islamic School of Law* (2005), p. vii.
[2057] Johansen, "Dissent (Ikhtilāf)", *The Oxford International Encyclopedia of Legal History* (2009), II, p. 345.
[2058] Weiss, "The Madhhab in Islamic Legal Theory" (2005), p. 1.
[2059] Stewart, "Sharia", *The Princeton Encyclopedia of Islamic Political Thought* (2012), p. 498
[2060] Weiss, "The Madhhab in Islamic Legal Theory" (2005), p.2.

scholar was, at least in part, connected to that of a founding jurist, master or intellectual figurehead whose authority was large enough to reflect on the authority of the succeeding jurists following his doctrines.

What later came to be known as schools of law (*madhhab*) could be seen as professional associations. The emerging contours of a *madhhab* as a professional association could already be cautiously worked out, both in the autonomous professional associations' internal and external effects.[2061] Internally, they increasingly regulated the curriculum and access to the profession, conveyed the professional mentalities needed, mediated between the professional association and the interests of society, and aimed to guarantee professional qualifications that are conveyed through tradition from one generation to the next. Externally, the professional association was the one that conveys the picture of "qualified practitioner" to the public, they arrange the safeguarding of prestige, influence and the monopolization of occupation.[2062]

c. Establishing Qualifications for Scholars

Precisely because the majority of *muftīs* acted in non-governmental capacity, their qualifications were not formalized for a very long time. For the *fatwās*, the jurisconsult was responsible and accountable to God alone and not to any official side.[2063]
Instead, the authority of the *muftī* was wholly a matter of scholarly reputation. What counted was the competence in dealing with authoritative texts, and reasoning about them in the way deemed necessary by the respective school. Significantly, it was the knowledge acquired through the study and understanding of law that granted the jurists the privilege to issue legal opinions.[2064] It is this knowledge that allowed basically anyone qualified to engage in *fatwā*-giving – no officially set up qualifications were necessary. Qualifications were largely left to the assessment and review by the peers of scholars. Eminent jurist Mālik b. Anas is said to have seventy people attest to him that he is qualified to issue legal opinions.[2065] Though this might be an overstatement, it clearly

[2061] Hesse, *Berufe im Wandel* (1972), p. 127.
[2062] For Makdisi, the *madhhab* as professional association was in fact the template for the inns of court, the professional association of jurists in England, 14./15.century. Makdisi, "The Guilds of Law" (1985), pp. 3-18.
[2063] Makdisi, "Magister and Academic Freedom" (1990), p. 125.
[2064] Motzki, "Religiöse Ratgebung" (1994), p. 13.
[2065] al-Nawawi, *Adab al Fatwa* wa *al-Mufti wa al-mustafti*, p. 18; Masud/Messick/Peters, *Islamic Legal Interpretation: Muftis and Their Fatwas* (1996), p. 20. See also Chapter Two, V.1.b.

transmits the idea that there is a collegial understanding of what constitutes a sufficiently qualified jurist for *iftā'*.

Formal conditions (*shurūt*) required of candidates for the position of muftī were set up rather late, in the fourth/tenth century in a separate section of the *adab al-mufti* treatises. These conditions were a mix of criteria of eligibility and qualifications. The specifics of these conditions highlight an initial set of differences between a *muftī* and a judge. In one such text of al-Nawawi's Adab al-Fatwa, the conditions are that the candidate "be an adult, Muslim, trusted, reliable, free of the causes of sin and defects of character, a jurist in identity, sound of mind, firm in thought, correct in behavior and derivation, (and) alert."[2066]

Again around the fourth/tenth century, both for teaching and for *fatwā*-giving (*iftā'*) an *ijāzāh*, a certificate or license confirming these competences issued by a higher scholar in the field of law were needed.[2067] However, a first description of a license for giving legal opinions seems to have occured between student and teacher in Baghdad.

Later scholar and judge Ismaʿīl b. Isḥāq (d. 282/ 896) started his legal career as a student of the renowned Māliki scholar in Baghdad, Aḥmad ibn al-Mu'adhdhal. Ismaʿīl b. Isḥāq began a long line of judges from the Mālikī school in Baghdad. Significantly, he received his license to give legal opinions from (*udhina lil-futyā 'an*) his teacher Aḥmad ibn al-Mu'adhdhal.[2068] For *C. Melchert* this wording is crucial as it might be the earliest ascription to any teacher of giving license to his student specifically to give legal opinions, as opposed to license to relate his *hadīth*.[2069] Systematically speaking, it seems that only later, 10th century with the emerging genre of *adab al-muftī* (Etiquette for the Jurisconsult) scholars began to set up and standardize normative recommendations for the qualifications of the jurisconsult.[2070] Previously, instead of formalized requirements,

[2066] Al-Nawawi, *Adab al Fatwā*, p. 19. The passage continues: "Equally (suitable) are a free man, a slave, a woman, a blind man, and a mute- if he can write or if his gestures are understood." Beyond the generally more stringent moral requirements and higher intellectual standards of position, the mufti was distinguished from the judge in that the incumbent could be, in theory, a woman or a slave. See Massud/Messick/Powers, *Muftis, Fatwas and Islamic Legal Interpretation* (1996), p. 18.

[2067] Mandaville, *The Muslim Judiciary* (1969), p. 11. The full title of his authoritzation was "the licence to teach law and profess legal opinions (*al-ijāzah bi al tadrīs wa al iftā'*), Makdisi, "Magisterium and Academic Freedom" (1990), p. 125.

[2068] Ṭalḥah ibn Muḥammad ibn Jaʿfar, *Ta'rīkh*, in Al-Qāḍī 'Iyād, *Tartīb*, III, p. 170, cited by Melchert, *The Formation of the Sunni Schools of Law* (1997), p. 171.

[2069] It remains open if the source from the tenth century is a projection backwards from that time, and does, strictly speaking, not congrue with the technical term ajāza, licence, but a synoym, see Melchert, *The Formation of the Sunni Schools of Law* (1997), p. 171.

[2070] See Chapter Two, V.1.b., and Chapter Four, III. 2.e.

peer assessments were a practiced way to monitor the qualifications of the scholars who teach and issue legal opinions.

d. Monopoly of Qualification

Scholars sought to monopolize their profession through their knowledge and services, like teaching and *fatwā-giving*. To control that these were given in a competent and unselfish way for the sake public interest, only qualified professionals were meant to provide professional services and to assess these services. But it was only very gradually that the scholarly profession strove to a functional monopoly, controlling the "market of knowledge", and protecting their freedom and autonomy from foreign control.[2071] It is difficult to assess with accuracy in how far scholars as a professionalized group monopolized the definition of the career, the way to enter the profession as scholars, and the rules of conduct.[2072] We do know of a large autonomy in monitoring their scholarly activities. Though *Melchert* employs no professionalization theory, he offers three major criteria to describe how achievement of required qualification was ensured and monopolized by the scholars in Baghdad of the late 9th century: 1) the recognition of the chief scholar, 2) commentaries on the summaries of legal teachings, as a proof of one's qualification, 3) and a more or less regulated process of transmission of legal knowledge.[2073] What held "the school" together and gave the school some monopolizing authority was a primary reference to a common doctrine, the same teachings or intellectual methods.[2074] Monopoly came by knowledge and skill, and not, as in the case of the *qāḍī* by state symbols such as appointment certificate or insignia like a particular clothing dress.

e. Professional Codes of Conducts: Adab al-Muftī (Etiquette of the Jurisconsult)

It is likely that professional and ethical norms governed the practice of *fatwā*-giving within social relationships between those issuing and those requesting them. Evidence

[2071] See Siegrist, *Advokat, Bürger und Staat* (1996), pp. 13-14.
[2072] More generally on the monopoly of occupation, see Siegrist, *Advokat, Bürger und Staat* (1996), pp. 13-14.
[2073] Melchert, *The Formation of the Sunnni Schools of Law* (1997); Romanov, "Toward Abstract Models for Islamic History" (2013) n.p.
[2074] Weiss, "The Madhhab in Islamic Legal Theory" (2005), p. 2.

for these norms as professional codes of conducts however, only emerged with the genre of *adab al-muftī wa al-mustaftī* (Etiquette for the Jurisconsult and the Fatwa-Requesting side) in the 10th century. In these norms, the position of the *muftī*, her/his manners and methods of issuing a *fatwā* are laid down.[2075] This genre informed the professionalization of the *muftī*[2076], a professional code of conduct. These rules were normative, yet not imperative. Thus, their violations were not formally sanctioned, though there might have been a way to informally sanction breaches to this self-imposed code of conduct. Collegial peer pressure is possible to have had a similar effect as the written etiquette genre in that scholars tried not to overstep what was considered professional ethics, especially with regards to those who regarded themselves to be of knowledge, integrity and piety in setting up what Islamic law was understood to mean. Scholars were autonomous in dealing with the violation of ethical-professional norms, and treated these as matters of self-regulation within their scholarly community (except for when these constitute legal transgressions) rather than an arena for state legal interference.[2077] In fact, collegiality, as discussed below, functions as a means to preserve joint interests, but also as a means to sanction those going against them.

It would need further research to assess how much the *adab al-muftī* were indeed refered to as reference for the scholars acting as jurisconsults. We do know thought that the product of scholarly work was subject to critique, peer evaluation and informal control. The prominent example of Abū Ḥanīfa and Ibn Abī Layla who vociferously and publically critized each others work[2078] is as much evidence as the very genre of *ikhtilāf* (monographs on disagreement between scholars) and the emergence of different doctrines, teachings and schools. Especially an influential scholar could lend some of his authority to another scholar – or when necessary – deprive him of it.

Why the *adab al-muftī* genre appeared in the 10th century, i.e. around two centuries later than the largely similar *adab al-qāḍī* literature leaves room for speculations. It seems that by then there was an increase of the number of scholars acting as *muftīs,* and/or *fatwā* activities (*iftā'*), and/or the importance of *fatwās* in private and public. With this increase and significance, the art of legal opinions needed to be more closely scrutinized and key standards put down in writing to assess the quality of *fatwās* circulating.

[2075] See Masud, "Ādāb al-Muftī (1984), pp. 124-151; idem., "Adab al-muftī", *EI* (3).
[2076] Calder, "The 'Uqūd rasm al muftī of Ibn 'Abidin" (2000), p. 215.
[2077] See similarly, on formal autonomy within collegial organizations Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 958.
[2078] On the dispute of Ibn Abī Layla and Abū Ḥanīfa, Chapter Three, I.1.c.

f. Full-Time Occupation and Remuneration: Academia and other Jobs

The prevailing conception was that *muftīs* should not accept any remuneration for their *fatwās*, i.e. they should give *fatwās* for free.[2079] Similarly, teachers ideally were to provide instruction without receiving payment. [2080]

This scholarly occupation free of any remuneration leads to a crucial question for the degree of professionalization: In how far could the role of the scholar be fully occupationalized in the sense that the professional treats the performance of the function as a full-time job. Such a full-time job would be seen as a primary job or primary responsibility, on which he or she can safely depend for income to meet not only his/her personal needs but also those of a family.[2081] One could conceive of the scholar as an economic entrepreneur in that he exploits opportunities to live from the sales of his product on some kind of market, and so to operate as an "independent" person. This means that the scholar would nevertheless request fees, gifts and stipends for his services. The other typical alternative is that of patronage, whereby the scholar is sponsored and supported by some well-off side so that s/he can do her or his own work without directly meeting the exigencies of independent continuance.[2082] Also, individuals have often been their own patrons: They were scholars while at the same time they derived their main subsistence from personally controlled sources such as independent property income, as in commerce or trade, for example.[2083]

Several studies on the economic background of Muslim scholars have concluded that the scholars of the early centuries had to primarily engage in other occupations, mostly trade, to make their living.[2084] During the ninth and tenth centuries over 75 percent of the *ʿulamāʾ* or their families engaged in commerce or handicrafts.[2085] Also, government

[2079] Masud, "Adab al-Muftī" (1984), p. 140, See also Ibn al-Qayyim al-Jawziyya, *I'lām al-muwaqqiʿīn ʿan rabb al-alamīn* II, p. 262.
[2080] Massud/Messick/Powers, *Muftis, Fatwas and Islamic Legal Interpretation* (1996), p. 20.
[2081] On the degree of professionalization and the question of full-time occupation, with respect to artists who are, similar to scholars, dependent on external financiérs, see Parsons, "Professions" (1968), p. 537.
[2082] Parsons, "Professions" (1968), p. 537.
[2083] Parsons, "Professions" (1968), p. 537.
[2084] Ahmed, *Muslim Education* (1968), pp. 252-254; Goitein, *Studies in Islamic History and Institutions* (1968), pp. 8 and 219.
[2085] Cohen, "The Economic Background and the Secular Occupations of Muslim Jurisprudents" (1970), p. 39.

services, especially up to the eight century, offered positions that were attractive to scholars[2086], such as judgeship positions.

That some scholars earned their living successively through commerce as a side-job and temporary salaries as appointed full-time judges is exemplified by the career of Muḥammad Ibn Abī Laith al-Khawarizmī, who was a copyist (*warrāq*) in Iraq and was at the same time a respected jurist of the Ḥanafī school (*madhhab* of the Kufans) before he was assigned to the judgeship of Fustāt, Egypt in 205/820.[2087]

Later, *adab al-muftī* writers such as al-Nawawi discuss several issues relating to income, including support from the treasury (*bayt al-māl*), fees collected from questioners, collective support by the community, and gifts.[2088] Another solution was to provide appropriate income for *muftīs* and teachers was to establish pious endowments for their support.[2089]

By and large it has to be said that the biographical material on scholars describe them either as ascetics with little financial means or as part of the bourgeoisie with sufficient own sources of income. [2090] Generally, the intellectual activities of a bourgeoisie or "middle class" presuppose literacy, which presumes sufficient wealth and leisure, which in turn presupposes urbanization and economic prosperity, which is precisely what happened in the Near East with the rise of Islam as a dominant intellectual thought.[2091]
Also *D. Rüschemeyer* declares that expert occupations in the academy usually go along with processes of urbanization[2092], possibly as academic activities need exchange of critical ideas usually to be found in urban settings that might make more space for this exchange than rural areas where instead agricultural work is more prevailing. The more space, scoietial and financial acknowledgment was offered to scholars, the more their activities developed into full-time professions with remunerations sought either via caliphal stipends, or money from endowments.

[2086] Cohen, "The Economic Background and the Secular Occupations of Muslim Jurisprudents" (1970), p. 39.
[2087] Kindī, *Kitāb al-Wulāh*, p. 449.
[2088] Al-Nawawī, *Adab al-Fatwā*, pp. 39-41; see Masud, "Adāb al-Muftī" (1984) p. 149; Masud/Messick/Powers, *Islamic Legal Interpretation: Muftis and Their Fatwas* (1996), p. 20.
[2089] Masud/Messick/Powers, *Islamic Legal Interpretation*: *Muftis and Their Fatwas* (1996), p. 20.
[2090] See e.g. van Ess, *Theologie und Gesellschaft* (1997), IV, pp.731-737 who makes use of the concept of bourgeoisie to describe the socio-economic class of scholars and who registers with precision the distinctions among the class affiliations and professions of scholars, though especially of theologians.
[2091] See also Gutas, *Greek Thought, Arabic Culture* (1981), p. 5 and pp. 11- 20.
[2092] Rüschemeyer, "Professionalisierung" (1980), p. 311.

As legal scholars were not systematically financed by the caliphate, unlike judges, scholars largely benefited from the reputation of being immune from political corruption. The association of scholars being pious, integer and honourable was established precisely because many jurists were sceptical of the state and sought to distinguish themselves from the judges.

Early scholars had to seek ways to finance their scholarship. To be able to dedicate as much time as possible and needed to their scholarly work, scholars used the income generated from their own business of independent property, or were dependent on fees, gifts, or stipends from sponsors and patrons. It seems that scholars could not live from their scholarship but that many either lived with little financial expectations or already came from a well-off societal class that allowed them to pursue their academic interests with the extent of time needed. After all, the early Abbasid time was one of high literary production, allowing a large number of scholar works to be produced.

g. Principle of Collegiality and Autonomy from State Authorities

The principle of collegiality is, to be precise, not an element of professionalization. However, collegiality, majorly elaborated on in the work of *M. Weber*[2093], lends itself to professionals who are highly specialized and individualized. As such, scholars, work largely on their own intellectual ideas, and yet are joined together through educational connections and interests. The link between collegiality and professionalism lies in the concept of expertise. Both collegial and professional domains mark the lines of the occupation by excluding those who do not possess expertise.[2094]

Talcott Parsons explains collegiality as an organizational principle when the claim to authority rests on the basis of expertise, like the expertise of law. He explains: "Instead of a rigid hierarchy of status and authority there tends to be what is roughly, in formal status, a 'company of equals', and equalization to status which ignores the inevitable

[2093] On the concept of collegiality, albeit in mostly negative terms (at least in the political sphere where they have only restricted possibilities to limit political power) to make space for advancing bureaucratization, rapid decision-making and efficient administration see Weber, *Wirtschaft und Gesellschaft* (1980), p. 562, 569. Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 946.
[2094] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 963.

graduation of distinction and achievement to be found in any considerable group of technically competent persons."[2095] For *Parsons*, one of the best examples seems to be the universities which were, unfortunately, entirely overlooked by *Max Weber*.[2096] Similarities exist in research centres and intellectual networks. Three elements are commonly considered as crucial for the principle of collegiality: expertise, equality and consensus.[2097] The exercise of authority on the basis of expertise is considered as first and foremost element of collegiality. Second, equality is an important consequence of claims to authority based on competence. Equality implies expert authority. Parson's calls this the "company of equals". If expertise is paramount, then each member's area of competence may not be subordinanted to other forms of authority. It is sufficient that they are formally equal, they do not need to be equal in performance to still be colleagues.[2098] As specialists, their performances might in any case be difficult to compare.[2099]

The third theme is consensus. The members of such organizations must participate in the decision-making process, and only decisions that have the full support of the entire collectivity "carry the weight of moral authority".[2100] At least, a "dominant orientation towards consensus" is required.[2101]

A collegial structure works as a repository of professional integration, precisely for individualized experts, ensuring the preservation of shared ethical standards that is to bind collective interests.[2102] Collegial formations seem to suit those professionals that belong to a privileged category of workers, such as scholars, with special value commitments and social arrangements that are not available to the general public.[2103] These formations do not represent a commitment on the part of professionals to truth or reason, but they nevertheless represent shared interests.[2104] These interests are realized in monopolizing the profession and their services, like teaching and *fatwā*-giving, non-

[2095] Parsons, "Introduction", *The Theory of Social and Economic Organization*, by Max Weber, (1947) p. 60.
[2096] Ibid. Parson interprets Weber's neglect of professional authority within the the principle of collegiality as a consequence of a perceived need to emphasize on aspects of coercion and hierarchy. See also Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 950.
[2097] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 955.
[2098] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 957.
[2099] Ibid.
[2100] Weber, *Wirtschaft und Gesellschaft* (1980), p. 163.
[2101] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 956.
[2102] Similarly, Waters, "Collegiality, Bureaucratization, and Professionalization", (1989), p. 946.
[2103] See Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 948.
[2104] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 948.

accountability and self-controling the professional practice. [2105] The professionals of collegiate organizations are professionals not because they carry out their work in terms of a contract of employment, or because they profit from a system of patronage but rather in terms of a set of vocational commitments to suprapersonal norms. These norms are ideally seen as taking precedence over all other interests.[2106]

Sociologist *M. Waters* is more concrete in the elements of collegiality. For him, the ideal-typical characteristics of the principle of collegiality entail the following[2107]: 1. theoretical knowledge (the use and application of theoretical, specialized knowledge), 2. professional career (members of collegiate organizations have their set of vocational commitments to suprapersonal norms), 3. formal egalitarianism (the performance of the specialists is difficult to compare and and so they are the formal equal of the other), 4. formal autonomy (the principle of collegiate allows for self-controlling, with no legal state interference), 5. scrutiny of product (the products of the work are subject to peer evaluation and self-control), and 6. collective decision-making (a complex, often hierarchical committee system assures the possibility of equal participation by all of thei specialist members). An ideal-typical analysis, here too, has the advantage of permitting the possibility of wide empirical variation.[2108]

Those who possess the theoretical specialized knowledge (Nr.1) were the legal specialists (*fuqahā'*, *muftīs*) who made the study and understanding of law their primary private occupation.[2109] It was the knowledge acquired through the study and understanding of law that granted the jurists the privilege to issue legal opinions[2110], and it granted them epistemic authority.[2111] In this, they were not different from a jurist-judge who had previously shared the same education and had engaged as a scholar prior to be appointed judge.

[2105] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 969.
[2106] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 957.
[2107] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), pp. 956-959.
[2108] See above on the *Idealtype* of professionalization, Chapter Four, I. 2. and Waters, "Collegiality, Bureaucratization, and Professionalization", p. 959.
[2109] On the private nature of fatwā-giving, Motzki, "Religiöse Ratgebung" (1984), p. 13.
[2110] Motzki, "Religiöse Ratgebung" (1984), p. 13.
[2111] Hallaq, *Authority* (2001), p. ix, pp.166–235; Hallaq, *Origins* (2005), p. 88.

Autonomy also led to an own set of vocational commitments to suprapersonal norms (Nr. 2).

Two aspects of formal autonomy are of relevance here. The first is freedom of action in relation to the pursuit of professional goals. Groups of colleagues were free to do research, to instruct others, and to communicate findings or other forms knowledge. Performance standards were increasingly established interpersonally and informally rather than by formal rules.[2112] Generally speaking, scholars represented the ideal of piety, morality and integrity throughout most of Islamic history[2113], even before the *adab al-muftī* genre that entailed the rules for vocational commitment were laid down. A second aspect of formal autonomy, then, is that violations of ethical norms were self-regulated within the communitiy of scholars and without state interference.[2114]

Formal equality (Nr.3) was a principle that applied both to the individual scholar as well as to the schools. Accepting the performances, especially the legal reasoning of the other, was a firm principle, recurred to multiple times within this entire work.[2115]

The autonomy of the collegiate for self-control as well as the expressed and applied scrutiny of the product (Nr. 4 and 5), seems to also have been part of early Muslim scholarly networks.

The professionalization of the scholarly expertocracy developed in autonomy from state authorities. Autonomy (from the state) together with self-control of organizations are important elements of the principle of collegiality.[2116] Collegiate organizations are not subject to direction from any external source. The competence of Muslim scholars to teach, research the law and its foundations as well as proclaiming these findings in legal opinions were matters within the control of the scholars, acting in the context of the (still fluid) contexts of the professional schools of the law, largely free and independent of outside forces. The authorization to teach and research come from the student's teacher, even if still to a large degree unformalized. Within these structures, the governing power had no say in the matter whatsoever.[2117] Though cooperation and cooptation of scholars

[2112] See above, professional code of conduct of scholars, III.2.e.
[2113] For example, Hallaq, *Origins* (2005), p. 77.
[2114] See Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 958.
[2115] On the formal equality as generated by mutual respect for the teachings of the scholar and the schools for each other, see Chapter Two, p.x.
[2116] See above, professional code of conduct of scholars, Chapter Four, III.2.e.
[2117] Makdisi, "Magisterium and Academic Freedom" (1990), p. 126.

into the state system occurred and were not few exceptions, the system of patronage did not deprive the scholars of their autonomy. The scholars controlled their own affairs. The autonomy of the scholars was largely granted because of the high esteem the scholars of scriptural authority had in society, so that the rulers had no option but to endorse both the jurists and their understanding of law whose authority depended on the human ability to exercise learned hermeneutics. Those who perfected this exercise were the jurists, and it was they and their epistemological domain that were often given free hand to set restrictions on the powers of the judges, and on the power of the state. The prestige the jurists acquired not only brought them autonomy from the state but also easy access to the state and to the circles of the political elite[2118] but also rendered them influential in judicial government policy as it affected legal matters, such as the appointment and removal of judges.

This autonomy, as individuals and as a collegial group, also enhanced their authority. It was constituted in part through their popularity with the population, so that the community was a source of authority as well.[2119]

Collective decision-making as a possibly way to come to consensus (Nr. 6) could be witnessed in the case of the scholars during Abbasid reign. In fact, the judicial chronicles provide us with interesting examples for the felt necessity of collectivity and consensus: when delegations of scholars approached the caliph to request the appointment and/or removal of judges, they did so not only as collective group but the idea of consensus was prevalent: while during one of the first delegations from Basra, they did not succeed with their choice before the caliph because of lack of consensus, as the jurisconsults did not voice their concerns and interests unanimously, the second documented instance of a delegation of scholars from Basra well kept the need for consensus in mind to give more weight of authority to their advice, which was then followed by the caliph.[2120] In this sense, collegiate organizations as collective decision-making forums set up by the scholars of one city, had a system that assured the possibility of equal participation by all of the specialist members, though there always seemed to have been a complex and

[2118] Wakī', *Akhbār al-quḍāt*, III, 158, 174, 247, 265; Ibn Khallikan, *Wafayāt al-a'yān*, II,321, 322; III, 204, 206, 247, 258, 388, 389; Hallaq, "Juristic Authority vs. State Power" (2003-2004), p. 252.
[2119] On the popularity of scholars among the population, see.e.g. Chapter Three, I.2.b
[2120] See the second delegation of jurisconsults affecting the judge they wished for, Chapter Three, I.2.a.cc.

hierarchical relationship within these at work.[2121] Ideally, these systems are geared towards consensus[2122] - and consensus was realized to be key to the delegations of jurisconsults for them to succeed with their advice. Similarly, *Tillier* concludes that at least the second Basran delegation members to the caliph must have felt the need for consensus after their first failure when they could not produce a unanimous voice. [2123]

Collegiality helps explain how highly individualized scholars act together to safeguard the interests of their profession. Maintaining autonomy and the means to self-control, goals of both professionalization as well as collegiality, cannot be acieved by the single scholar but need the group of scholars to act as a collegium. This is even more crucial as they were not part of a state apparatus that formulated the rules of scholarship for them.

h. Conclusion

Professionalization largely rests on specialization and differentiation from other occupations.

The *muftī*ʿs professionalization rested largely on two pillars: specializing in and contributing further to learning through research and scholarship, and differentiating the occupation from others in transmitting the learning, and the advice to others.[2124] The knowledge-based professionalization of the *muftī* is both a highly individualized one, while at the same time scholars as colleagues established and maintained recommended standards and procedures of scholarship. These standards and procedures were produced autonomously by the scholars, and peer review and self-control were strong elements of monitoring the profession of scholars. Professionalizationn went hand in hand with collegiality, in which equality, consensus, and autonomy were emphasized and in which decisions emerged as a collective product and were binding only on members.[2125] An occupation, particularly a full-time occupation, also necessitates the availability of pay for the practice of the profession. Here indeed, scholars often were dependent on additional incomes through commerce, on stipends or on accepting state positions such

[2121] See Chapter Three, I.2.a.cc. where consensus of a delegation of jurisconsults before the caliph was upheld despite the disruption of inner hierarchical structure this caused. See also Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 958 on the difficulties of collective decision-making within collegiality.
[2122] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 959.
[2123] See also Tillier, *Les Cadis* (2009), p. 169.
[2124] See generally on the professions of scholars, Parsons, "Professions" (1968), p. 539.
[2125] See Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 961.

as the judiciary to earn their living that also enabled them to pursue their scholarly interests. Increasingly, and in parallel with the strengthening of the schools in the overall Muslim societies, endowments were established for scholars to finance scholarship. The professionalization of *muftī's* thus was increasingly enlarged.

In comparison to the judge, it was not the difference in knowledge or education between *muftī* and judge, as the scholar was not much different from the judge in this regard. Rather, the fact that the jurisconsult was seen as independent and free from state-interference marked a difference that puts the jurisconsult in a more autonomous position than the judge, and in a position that enhanced his authority more.

3. Authority By Way of Wide, Non-Hierarchical Competences

The Islamic scholarly order was made up mainly of individuals of learned scholars, and had little space for formal institutions, other than the learning circles that later came to be known as schools.[2126] For large parts of Islamic legal history, Muslims did not set up explicit hiearchies in the fields of education, theology or law. Also, scholars were not forced into a bureaucratic government framework until their status and authority as scholars and as an organized group was formalized in the Ottoman period.[2127]

We have witnessed how judicial bureaucratization was particularly highlighted as a means to take forward the development of increasingly complex and differentiated legal institutions and activities. Judicial bureaucracy enhanced the authority of the judge whose fixed working scheme allowed for accountability and foreseeability of his workings.

How were the scholarly professionalized activities organized and how did this organization affect the scholar's authority?

The scholars' way to organize was by means of collegiality. Collegiality therefore did not only function as a set of normative specifications that supports the concept of professionalization of scholars (as elaborated above), but that also serves as a principle of organization.[2128] For *T. Parsons*, for example, competence alone can be the basis for a claim to authority within collegiate organizations and these claims to authority give rise

[2126] Hurvitz, *The Formation of Hanbalism* (2002), p. 159.

[2127] Blight-Abramski, "The Judiciary (Qāḍīs) as a Governmental-Administrative Tool" (1992), p. Under the Ottomans (from the 15th to the 20th century), scholars served as salaried bureaucrats and in various ways permitted the incorporation of their scholarly organization into the state. 40. See Repp, *The Müfti of Istanbul* (1986); Imber, *Ebu's Su'ud, The Islamic Legal Tradition* (1997).

[2128] See also Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 954-955.

to non-hierarchial forms of administration.[2129] As a principle of organization, collegiality and collegiate organizations in their ideal-typical characteristics are different from the principle of bureaucracy and bureaucratic organizations.[2130] Judges and jurisconsults as legal scholars organized their work differently, and I show how this reflected on their respective authority.

a. Competences Instead of Jurisdictions

On both normative and organization levels, *muftīs* regulated their own activities and determined the standards of the *fatwā* institution.[2131] What counted were their competences in deriving the law instead of jurisdictions. Consultancy, *fatwā*-giving and teaching was open to all those who were recognized by their fellow scholars as having the requisite intellectual and personal qualifications and competences.

Consultancy and *fatwā*-giving were not restricted by local or subject-matter jurisdiction. No law, written or unwritten, was in place to regulate the activities of the *muftīs*. Literature, even later *adāb al-muftī* literature, is silent about the scope and jurisdiction of a *mufti's fatwā*-practice. No document is available to instruct us on this point. The earliest *fatwās* known to us cover a wide range of subjects indicate that jurisdiction of a *muftī* embraces almost all aspects of life.[2132] They can deliber and write, other than the judge's jurisdiction, beyond justiciable law and include, for example, exegisis, dogma, or public law. Neither is interference of the caliph into scholarly dissemination of legal knowledge recorded. The jurisconsults' role was made effective through being strictly delimited.[2133]

Thus, the jurisconsult could work as a single intellectual, was locally unbound in his individual practice, needed no visible sign of authority and had no fixed workplace.

While the terms of a judge's jurisdiction, specified as part of the delegation of authority (*wilaya*) in his appointment, typically included hearing particular cases arising in

[2129] Parsons, "Introduction" to *The Theory of Social and Economic Organization*, by Max Weber, (1947) p. 60.
[2130] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 959.
[2131] Messick, "Fatwā", *The Oxford International Encyclopedia of Legal History* (2009), p. 58.
[2132] Masud, "Ādāb al-Muftī" (1984), p. 143.
[2133] See similarly the role of the "holy man" in late antiquity, Brown, "The Rise and Function of the Holy Man" (1971), p. 81: "It was through hard business of living his life for twenty-four hours in the day, through catering for the day-to-day needs of his locality, through allowing his person to be charged with the normal hopes and fears of his fellow men, that the holy man gained the power in society that enabled him to carry off the occasional *coup de théâtre*."

substantive areas of the Sharīʿa, such as transactions (*mu ʿāmalāt*), injuries (*jinayāt*), and Qur'ānic crimes (*ḥudūd*), no such subject-matter jurisdictions were set up for the *muftī*. A *muftī* was considered to be competent in all questions of the Sharīʿa, both the judiciable and non-judiciable. Thus while a judge was authorized to have jurisdiction over judiciable questions of this world, the *muftī* could go beyond this world and also issue opinions regarding reward and punishment in the Hereafter. *Muftīs*, unlike judges, could thus also answer questions connected with ritual law (*ʿibaḍāt*) that included ablutions, prayer, fasting, and pilgrimage, as these were equally part and parcel of Islamic law, yet non-judiciable. So while the *muftī* was confined to the field of non-binding law, the field of *fatwā*-giving was at the same time much wider in that it allowed to give opinions on non-judiciable questions, even when there was no conflict or litigation involved.

So while the jurisdiction of *qāḍīs* was limited, *fatwās* had a larger scope. [2134] The non-restricted competences of the jurisconsults are not unique to Muslim legal history. From Cicero we know that during Republican times (the second century BC) jurisconsults would pace up and down the forum or would sit at home in a type of throne (*solium)* and would give advice on the many and diverse subject-matters: "not only would questions of civil law be proposed to them, but also inquiries about the appropriate marriage candidate for a daughter, about the purchase of a piece of land, the agriculture of an estate, and about any type of obligations and businesses". [2135]

It is speculated whether also judges can issue *fatwās*, however, it is agreed that an active judge could only issue legal opinions in connection with nonjusticiable matters, such as rituals.[2136] In fact, Wakīʿ mentions one such *fatwā* by a judge where he gives his legal opinion on the cutting of hair and nails during the period of pilgrimage.[2137] This example shows that a judge can issue a legal opinion on ritual matters that lie outside of the litigation case, and this might have occurred in his capacity as religio-legal scholar rather than judge.

[2134] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 80.

[2135] Cicero, de orat.3, 133 as quoted by Kunkel, *Die römischen Juristen* (2001), p. 58. A look at the Roman law example shows, that the activitiy of jurisconsults was regulated through imperial licences that allowed certain jurists only to issue legal opinions.

[2136] Al-Nawawi, *Adab al-Fatwā*, p. 22; Masud/Messick/Powers, *Muftis, Fatwas and Islamic Legal Interpretation* (1996), p. 19.

[2137] Qāḍī of Khurasān Yaḥyā b. Yaʿmur issued the following fatwā: The man who buys his sacrifice (aḍḥiya) is not allowed to cut his hair or his nails until the tenth day (of dhul al-ḥijja). Wakīʿ, *Akhbār al-quḍāt*, III, p. 305.

It is this open character of this institution that not only gave *muftīs* their valued autonomy from the state. [2138] It is this open character and organizational autonomy that served as a resource for the authority of the *muftī*. Here we return to the previously mentioned conception that bureaucracy can clash with autonomy.[2139] Judicial bureaucratization was particularly highlighted as a means to take forward the development of increasingly complex and differentiated legal institutions and activities.[2140] In this sense, it enhanced the authority of the judge whose fixed working scheme allowed for accountability and foreseeability of his workings.

In the case of the *muftī*, it is precisely the absence of fixed and official jurisdictions and pre-set working-schemes that are seen as enlarging the *muftī's* authority and his autonomy to deliber and write on the law. No state-stipulated or state-sanctioned working-schemes were at place. In this way, collegiality as a non-bureaucratic principle of organization and de-limited competences were the scholars' way not only to monopolize the profession in their own design and to achieve "status closure" against lay-people and thus for the incumbents to guard their privileges, but also key in providing barriers against the influence of state and political interests, to the extent wished for by the scholars.[2141] Compared to *qāḍīs*, jurists had a less restricted and more independent role in the production of legal texts, legal education and *fatwās*.[2142] This success added to the perceived authority of legal scholars.

b. Institutionalization of *Fatwā*-Giving

Even without bureaucratization (which *Weber* considers far more efficient and effective than collegiality as principle of organization), the *fatwā* practice institutionalized and thereby strengthened its function within the Islamic legal order.[2143] While scholars first developed largely as an informal group of like-minded thinkers they increasingly transformed into a more formal and institutionalized group entity with more pointed

[2138] Haram, "Use and Abuse of Law" (1996), p. 72.
[2139] See the elaborations on judicial bureaucracy, Chapter Four, p. 73.
[2140] Eisenstadt, *The Political System of Empires* (1963), pp. 137-38.
[2141] On collegiality and status closure as a way to maintain privileges, Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), pp. 963-964.
[2142] Masud, "Ikhtilaf al-Fuqaha" (2009), p. 80.
[2143] Proponents of the principle of bureaucracy consider bureaucratization a more efficient and adept form of organization than collegiality, see Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), pp. 961-962.

characteristics of a professionalized and institutionalized order. As key part of this institutionalized order, scholars created permanent of spaces of instruction and practice and its acknowledgment. These started as learning-circles (*ḥalqa*) and later on developed into schools of law (*madhhab*).

The earliest learning circles already provided a first institutionalization of *iftā*.[2144] Also, the creation of a professional group of scholars of law and religion was an essential condition for the institution of *fatwā*-giving (*iftā'*). *H. Motzki* therefore argues that the turning-point from an informal to an institutional *iftā'* already occurred by the end of the 1st /7th century of Islam because scholars were explicitly appointed to the office of *muftī* by political authorities.[2145] Other scholars, however see early political involvements in the *fatwā*-practice as a form of official recognition, rather than official appointment.[2146] Conventionally, the institutionalization of *iftā'* occurred only as late as in the 15th century in the Ottoman Empire, where a grand *muftī* (called the *Shaykh al-Islam* under the Ottomans) was appointed for the first time by the political authorities.[2147] At any rate, early institutionalization concurred with the professionalization of Muslim scholars and strengthening of their scholarship. [2148]

In view of the little institutionalization other than the learning circles, and the detachment from and of the state and of any of its organs from the domain of law, legal authority was instead anchored in another source: the jurist as an individual legal personality[2149], and as part of a collegial structure that generated collective authority. Collegiality as authority is likely to have emerged particularly strong as scholars as occupational group strove to monopolize their profession to resist state and bureaucratic interests.[2150]

[2144] Motzki, "Religiöse Ratgebung" (1994), p. 12.
[2145] See above, Chapter Four, III.1.b. on the question of state authorization of *fatwā*-giving.
[2146] Zaman, Religion and Politics (1997), p. 147.
[2147] See for instance, Nunè, "Il parere giuridico ("fatwā") del "mufti" nel diritto musulmano" (1944), pp. 27-35.
[2148] On the relation between professionalization and institutionalization, see Rüschemeyer, "Professionalisierung" (1980), p. 311. For an example of the simulteanous professionalization and institutionalization of Muslim scholarship in medieval Damascus (11th/12th century) see Gilbert, "Institutionalization of Muslim Scholarship" (1980), pp. 105-134.
[2149] Hallaq, *Authority* (2001), pp. 23-24.
[2150] On collegiality as a form to resist state interests, see Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 969.

c. Conclusion

Neither the scholars themselves nor any political authority attempted to bureaucratize the scholarly field. *Muftīs*, and scholars in generals, organized non-bureaucratically as *fatwā*-giving occurred by the individual *muftī* who acted alone and in his individual capacity, with no division of labour, no office hierarchy or personnel, no fixed jurisdiction. No written documents preserved for accountability, other than the sometimes written result of the *fatwā*, as well as his teaching and research material which were written, circulated and transmitted to establish a scholarly system of Islamic law.[2151]

Instead, scholars established a somewhat egalitarian structure, with the utmost autonomy for its members in their *fatwā*-practice and their teachings and strived to a consensus (at least within the nascent schools) as a means to formulate law as their professional goal. This is how scholar established a collegial authority which recurred to this egalitarian, autonomous, and consensus-driven network of scholars. It is in this sense, that the scholars' authority is different from the bureaucratic authority that supports the *qāḍī* – an authority that is hierarchical, rule governed and specifies accountability for the judgments. Egalitarian structures of collegiate organizations are in contrast to hierarchical forms inherent in bureaucracies. Thus with the egalitarian cllegiality of the scholarly expertocracy and the bureaucracic judiciary we have contrasting organizations that underline different aspects of authority.[2152]

Both collegiality as an organizational type of authority and bureaucratic authority as embodied by the judge, are similar in that they rely on the employment of expertise to realize their goals.[2153] Jurisconsult and judge are each ideal-typically skilled and qualified to handle complex, cognitive questions of the law. Still, collegiality (as practiced by scholars) and bureaucracy (as practiced by judges) operate on different sets of concepts.

The delimited scope of the *fatwā*, covering also questions of rituals to be judged in the Hereafter, enlarges the authority of the *muftī*. The esteem for their knowledge and

[2151] Hallaq, "From Fatwā to Furūʿ" (1994), p. 29-65.
[2152] For a discussion on the possible, even often occuring coexistence and tensions of collegial and bureaucratic forms of organization and authority, see Waters, "Collegiality, Bureaucratization, and Professionalization", (1989), pp. 959-962.
[2153] Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 969.

integrity explains the rise of the legal scholars and their increasing influence as it evolved both in the scholarly and societal fields.

Their authority was not mediated through a bureaucracy and was therefore undivided and "absolute".[2154] It was not divided between "professional" and administrative"[2155], as was the case with the *qāḍī*. The *muftī* can claim authority differently from a judge within a bureaucratic system that entails an "office". As the *muftī* involves no specifically defined powers the range and scope of authority was much wider. Surely, no specifically defined powers can be harmless as far as there is no bindingness attached to consultancy, fatwā-giving and teaching. This convential view, however, underestimates the different ways a *muftī's* word can attain power even without bindingness formally necessary. It seems that the *muftī's* considerable influence excercised by the jurists on the interpretation and the development of the law constitutes the main reason for the interference of the Ottomans in and control of the State over the *muftī* profession.[2156]

IV. Conclusion: Organizational Authority

Authority of legal personae is shaped by organizational conditions. The organizational conditions of judge and jurisconsults were steered by (de-)centralized state policies, professionalization or bureaucratization or collegiality, be they state-driven and/or autonomous. Also, the organizational status of the law affects the role of the jurists formulating, interpreting, and applying the law, especially since the law was non-codified.

The caliphate as a State authority had its own concerns and involvements that appeared in the form of giving the judiciary a centralized organization. The caliphs enjoyed wide-ranging powers in organizing the judicial sphere within their realm, allowing them to effectively privilege specific schools of law (and theology), to patronize individual scholars, and to marginalize others or exclude them altogether. The judiciary was strengthened through centralization, professionalization and bureaucratization, in part with the support of the State endorsed the judiciary with caliphal delegate authority and aided in the professionalization process through an involvement in the choice of judges

[2154] See Waters, "Collegiality, Bureaucratization, and Professionalization" (1989), p. 960 on exclusively collegiate organizations undivided by bureaucracy.
[2155] Ibid., p. 959-960.
[2156] Tyan, *Histoire de l'organisation* (1960), p. 220.

and salaries, turning the judiciary into state officials, authorized to dispense justice by the caliph. The officers of the law were centralized, professonalized and bureaucratized and became part of the top hierarchy of the state and a body of *qāḍī*s was trained and moved at intervals throughout the Abbasid caliphate. The judge's authority was thus both enhanced and diminished by his proximity to the State, granting the judge coercive authority in adjudication but leaving him to the recurring accusations of giving in to moral and financial temptations of corruption as well as serving the political and ideological aims of the Abbasid caliphate.

The development of strengthening the judge's authority was countered by legal scholars who gained increasing status in the public sphere. Though scholars were institutionally free from state interference, not all were financially independent but instead benefited from caliphal patronage. Prominent legal scholars rejected the codification of laws, or at least, did not support and call for the idea of codification. They used the absence of codified law to seek continuous influence through their legal opinions, also at court. Legal scholars thus retained their authority and spheres of influence on the judiciary. No codification of the law meant that neither judge nor jurisconsult were formally bound by codified law, if codification can be understood to mean to tie the judiciary and legal scholars. Instead, they were bound by their understanding of what the law was meant to say. The caliphate eventually stayed away not only from codification but overwhelming kept away from interefering with the *fatwā*-practice. It refrained from assigning any role for the jurisconsult and the *fatwā* in adjudication.[2157]

A strong centralizing tendency in the judiciary was countered by a decentralized consultative justice through scholars who attempted to control, standardize and unify the law through extrajudicial interferences at court. In their encounter, the judge as a single was often confronted with the *muftī* who was part of a larger network and collegium of legal scholars. While both judge and jurisconsult increasingly professionalized, their

[2157] In contrast to the Abbasid example, Roman emperor Hadrian shows his interference into the practice of *responsa*-giving: State interference to determine the binding nature of the legal opinion on the judge, changing the legal nature of the *responsum* from non-binding to binding. *Responsa* become law. See, for example, Kaser, *Das römische Privatrecht* (2008), p. 210; ibid, *Römische Rechtsgeschichte* (1978), p. 179; Sohm/Mitteis/Wenger, *Institutionen* (1949) p. 95; Wieacker, *Recht und Gesellschaft in der Spätantike* (1964), pp. 48-49, Honoré,"The Severan Lawyers" (1962), pp. 228-229, 231.

further organizational authority differed. Collegiality (as practiced by scholars based on equality, autonomy and consensus) and bureaucracy (as practiced by judges as based on fixed jurisdictions and office hiearchies) are distinctive ways for each to organize their activities, and to coin their authority.

To conclude, the chapter's hypothesis of the judiciary as key figures of a centralized judicial policy and the legal scholars as actors of the decentralized sphere eventually needs to be nuanced. The overall judicial, financial and administrative system, especially when not under direct influence and proximity of the caliph, can be envisioned along a broad spectrum of degrees of centralization. So it might be necessary to draw a complex judgment on the issue of State centralization and how it affected the authority of judge and jurisconsult vis-à-vis each other: While certain aspects of the judicial system are relatively centralized such as appointments, removals, and salaries, other were rather decentralized such as the establishment of judicial training or the development of professional code of conduct, the *adab al-qāḍī* manuals, that were both in the hands by scholars who acted without state directives.
At the same time, legal scholars, while largely acting independently of the state, minding the production of their literary works and engaged in a legal discourse that established their school understanding as superior over other schools, could also be seen to be, at least in part, legitimizing and thus taking part of the centralizing State. Especially financial incentives, such as the salary for judicial posts, or stipends for the production of legal works, visits at the royal courts that ended with gifts being awarded, were ways to coopt legal scholars into the overall Abbasid system. Some scholars under patronage were at the heart of central power (like jurist and chief justice Abū Yūsuf) while many other judges, not only in the provinces, remained untouched by state politics – and actively cautioned against it as a field that runs the danger of moral and financial corruption, which also served as a topoi to enhance their authority as integer and pious jurists. Thus, while the relationship between judges and jurisconsults can nevertheless be seen through the lense of centralization and decentralization, as many elements corroborate this distinction, neither centralization nor authority can be understood as static.

In fact, centralization was challenged many times by local jurists, as Chapter Three accounts for: Despite the fact that appointments and removals remained in the hands of

the caliphs, the jurisconsults exercised their local impact as well as their influence on the caliph in composing the judiciary. They nominated judicial candidates that suited their legal rationale, they rallied against a judge they wanted to be removed from office, and they came in person to complain about the judge, whether as a delegation, as collective authority, or as single jurists and scholars –in many cases, the caliph conceded to the jurisconsults' authority, at least by receiving them and allowing them access to him personally. Though the caliph did not follow the jurisconsults' opinion in all cases, the fact that all actors involved, the caliph, judge and jurisconsults, were aware of the jurisconsult's access to and persuasive authority over caliph, made everyone reckon with their authority. And so cracks in the concept of caliphal centralization of the judiciary become apparent with the jurisconsults' weight and authority. Even if the caliph attempted to have a determined, centralized hold on the judiciary, with the intention to standardize, or even legally unify the provinces, they chose nevertheless to take into consideration the authority of local legal scholars with their local legal traditions.

Chapter Five. Conclusions: Debating and Creating Authority

In the introduction of this work, Chapter One, I laid out the motivation for the inquiry into the conception of legal authorities: It is the structure of authority and legitimacy in Islamic legal history, that is, the way in which particular legal personae explain and justify their activity, authority, legitimacy, and ultimately power to themselves and to others. Therefore, this work is meant as a contribution to the study of legal personae (Rechtsstab) and how they apply, make, regulate, order, and control the law as well as those administering it. It is also meant as a work linking the authorities of legal personae to the authority of the law, of connecting persons to the law and the developments and institutions they establish.

Behind this structure of authority and legitimacy between judge and jurisconsult I analyze one major question: Who has the authority to determine the final say on interpreting scripture beyond the text? And by extension, what is the scope given to legal reasoning in interpreting scripture – and, more importantly, who was it given to? How was authority gained for the acceptance of a particular legal position?

For a study of legal authority, judicial consultation proved useful as legal instrument through which the jurisconsults expressed their authority vis-à-vis the judge. Judicial consultation shows that the judge solicited the jurisconsult's legal opinion because they were regarded as being able to produce authoritative statements. Yet, the legal instrument does not easily reveal the hierarchy of authority in the cases of unsolicited, imposed and rejected advice, which also marks the relationship between judge and jurisconsult.

This work presents authority of legal personae as a normative, empirical and organizational question.

Looking at the question normatively, Chapter Two demonstrated how the authority of judge and jurisconsult was designed by the jurists of the formative period. The study of the foundational writings of the Ḥanafī and Shāfiʿī schools provide valuable information

on how the idea of "consultative justice"[2158] was normatively envisioned: Judicial consultation was held an important normative (yet not imperative) principle to guarantee good adjudication, or to "come closest to the truth".

The (at times ambivalent) nature of judicial consultation allows us to make the following statements: First, indeterminacies in law and texts, and the jurists' consciousness for these challenges necessitates consultation. Both judge and jurisconsult interpret the law, both risk running the danger of error, and both display awareness of the burden of interpretation and adjudication. Consequentially, judicial consultation has the effect of juridical and judicial risk distribution between judge and jurisconsult. Judicial consultation thus entails a possible conception of shared juridical responsibility. The *who* and *when* of consultation between judge and jurisconsult thus are elements of a remedy for distributing juridical, and judicial, risk.[2159] Authority as normatively encapsuled in judicial consultation is largely one of dealing with the uncertainties of law. Uncertainty produced authority of legal personae, it produced an expertocracy, or a system of "rule of expert knowledge"[2160], that judges were meant to reach out to when they did not know or were uncertain about the law or did not want to (alone) take the risk of erring, or needed to seek legitimacy and validation for their finding. Consultation was meant to reduce the risks of judicial activism, adjudication entailing subjective element beyond text, according to Shāfiʿī's understanding.

Second, consultation creates and yet mitigates the conflict between the autonomy of the judge and the authority of the jurisconsult, the so-called "paradox of authority". Appealing to authority does not, as sometimes claimed, reduce the autonomy of the appealing subject. The appeal to such purposive, persuasive authority can instead be read as an autonomous strategy. The judge sets the end himself, and the judge continues to steer in that the judge must evaluate whether this strategy will achieve the end he wishes. The judge is not freed from evaluating the content of the reasons for appealing to the extrajudicial authority. It is in this sense that Shāfiʿī explicitly cautioned that the judge should only follow this advice when he is persuaded by the reasons presented by the jurisconsult. Muslim jurists were keen to emphasise that judgment emanates from the

[2158] Becker, *Islamstudien* (1932), II, p. 313 (Konsultativjustiz) who spoke of the *fatwā*-giving practice of *muftīs* in general.
[2159] See Chapter Two, V. 2.b.
[2160] Weber, *Wirtschaft und Gesellschaft* (1980), p. 129 ("Herrschaft kraft Wissen").

judge's authority alone, that his decision remained his alone, even when advised by the jurisconsult. Having said this, the elaborations on extrajudicial authority in adjudication underline that even when the judge adopts an advice as a very weighty reason to judge accordingly, the judge is always warned to not have advice replace his own legal reasoning. Rather than replacing, the advice is simply to affect the judge's legal reasoning. Seen this way, the jurisconsult is seen as not exercising authority over the judge. He attempts to persuasively affect the judge's reasoning, rather than replace it.
Thus, my reading of both jurists is that the autonomy of the judge is maintained while the authority of the jurisconsult to have his legal opinion solicited and, possibly adopted, is taken into account only when it is persuasive because it comes closest to the perceived truth or the method considered true.

Third, the jurisconsult can be conceptionalized as a guide or a constraint to adjudication – or both. The role for jurisconsults was to monitor adjudication and to provide quality control.[2161] For jurisconsults it was not only to provide legal information but also to ascertain whether or not adjudication was being performed properly. Through judicial consultation, jurisconsults could act as quality assessors, monitoring that all possible textual foundations were taken into consideration and hold back subjective elements, or judicial activism.

Examining the question empirically, I note that judicial consultation was exercised for reasons related more to questions of power and legitimacy, as I explain in Chapter Three. Three points are important here: 1) Uncertainties in law, a key theme in the normative writings on judicial consultation, are barely explicitly mentioned as reason for the practiced influence of jurisconsults on adjudication and the judiciary; 2) the reasons for jurisconsults' interference was economic and social, aimed at upholding an established and accepted pattern of order by the legal elites of a city or region, and additionally aimed at strengthening the legal hegemony of the local school; and 3) to that end, jurisconsults employed not only persuasive but also quasi-coercive means.
While normative questions of uncertainty are not explicitly mentioned and are possibly the reason only in those cases were authoritative texts remained vague, or clearly remain

[2161] Similarly Neil Duxbury argues that the role of legal scholars, especially between the 1940s and 1960s, was to monitor the legal process, see Duxbury, "Faith in Reason" (1993), p. 636; Kennedy, *The Canon* (2006), p. 248.

silent and succeeding jurists needed to derive the law, such as judge Mufaḍḍal requesting extrajudicial advice from jurisconsult Mālik on questions of blasphemy and property, jurisconsults exercise authority over judges in cases concerning the economic and social order. Also, religious reasons were made explicit only in one case, namely when jurisconsult Layth b. Saʿd complained about a judge harming the Prophetic Sunna with this adjudication on property.

Judicial chronicles revealed that rather than the concerns of not violating authoritative sources, it was more often economic and social concerns, and the interests of upholding the local legal domination of the respective nascent school of law that made jurisconsults interfere, suggest, and even impose their opinion on the organization and adjudication of the judiciary. As jurisconsults could not coerce the judge to follow their opinions, they instead employed means, particularly by involving the caliph with his coercive powers, leading to a quasi-coercive authority that made many judges act the way jurisconsults wanted. With the quasi-coercive authority of the jurisconsult the judge was threatened to lose his employment and often adapted to the jurisconsult's opinion to protect himself from this dire possibility.

Organizationally, authority could be enhanced or restricted depending on how the legal profession was embedded into the system of state and society. As we saw in Chapter Four, the question of authority was understood with regard to the distinctive character of the institutional system within which authority arose. The judge made the judge part of the centralized state system, professionalized and bureaucratized. The judge's authority was thus enhanced in that he was, formally, not accountable to anyone but the highest judicial authority in the empire, the caliph. As a delegated state authority, the judge, professionalized through his increasingly educational qualifications and training, the monopoly of his appointment through the caliph, his emerging full-time occupation and salary as well as professional autonomy from other legal figures, and gained professional authority. The judge's authority was largely one that was conferred by a system of rules, an authority that came through the official authorization to dispense justice. The authority of the judge, is thus in fact also built on the authorisation conferred via the office.

The judge's authority yet was also hampered by precisely this proximity to the state, and all the negative associations, assumptions, and speculations that came with this proximity, both in the normative literature as well as in the judicial chronicles: worldly temptations, such as corruption, were mentioned either as a warning in the normative literature, or as a real critique that lead to a diminished standing, authority and legitimacy of the judge.

The jurisconsult, or *muftī*-scholar, on the other hand, benefited immensely from the perception as an independent scholar who sought his authority not from his appointment by the caliph but rather acted as an individual detached from the state. Though this understanding in part neglects the system of patronage, in which scholars benefited from stipends and gifts by ruling authorities, their independence yet was constitutive in enhancing their authority and legitimacy as interpreters of Islamic law, free from state interests. The *muftī*-scholar's authority is an "authority as power over people"[2162], not because they were installed but because their position in society, and their interpretive, epistemological role as "heirs of the Prophet" entitled them to be so. The *muftī*-scholar's authority is over people is thus "the ability to influence another person's fate and choice of options"[2163], namely the judge's choice of options and fate.

Throughout this study, Muslim jurists and historians were studied to show that different dimensions of authority, especially when debated and created in phases of significant historical transformation such as the one of Abbasid judicial policy, are relational, contingent and situational. Epistemology, legitimacy and power decided on who had the authority to fill the gaps of legal text, the authority to deal with the limits of legal interpretation. Their positions in the legal system and in society are a result of personae interacting with each other and explaining their competences to themselves and to others.

Legal professionals need to work with an increasing array of often conflicting legal materials, whose interpretation requires inquiry and consultation which can come in diverse formats. Judicial consultation between judge and an extrajudicial legal authority is a legal instrument and practice known in many legal systems, as the Roman, Italian or

[2162] Shapiro, "Authority" (2002), p. 398.
[2163] Raz, *The Authority of Law* (2009), p. 7.

German examples of extrajudicial consultation show.[2164] Its underlying principle is arguably practiced in some adjudicative systems today in the form of the judicial bench, where judges discuss cases with each other acting to guide and control each other. After all, the features of uncertainty in law and the explicit responsibilities of legal personae to do justice as well as the delicate balance of authority, legitimacy and power in adjudication and the organizational role of adjudication in society remain acute. Next to these challenges affecting any legal, adjudicate system, there are some specificities of Islamic law that might explain the importance of judicial consultation in the Islamic legal system[2165]: First, Islamic law is a law that requires accommodating a religious path for the Muslim community. Shāfiʿī argued that this brings with it a particular responsibility of jurists to do justice to God's revealed words, and instigated the development of the foundations of the law (*uṣūl al-fiqh*). This concept lent authority, especially epistemological, to the experts of law. Method is particularly important in the face of uncertainty that gives a lot of interpretive leeway to probabilistic law-making. Legal authority involves the conditions, ability and rules defining legitimate methods of interpretation.[2166] The methods of law were constitutive for the making of authority.[2167] Through the instrument of judicial consultation, legal experts acquired consultative, judicative, juridical and legislative functions. Judicial consultation was normatively designed to facilitate three outcomes: a joint legal discourse, a horizontal peer review and a juridical risk distribution. These are key findings I present in Chapter Two.

A joint legal discourse between judge and jurisconsult was considered necessary in cases that either produce no closure by authoritative text, i.e. no definite constraint by text (Shāfiʿī), or in all cases brought to court, since interpretation is inherent even in cases considered clear-cut through authoritative text (Khaṣṣāf). The judge is to reach out to the jurisconsult to guide him in adjudication by pointing out normative rules not considered by the judge.

Shaping the law also means controlling the law. Judicial horizontal peer review also signifies that the jurisconsult acquires the role of controlling the judge. Jurisconsults needed to determine how far the authoritative texts reach, without, so Shāfiʿī, engaging

[2164] See, for example, Krüger, *Fetwa und Siyar* (1978); Kirshner, "*Consilia* as Authority in Late Medieval Italy" (1999); Falk, *Consilia. Studien zur Praxis der Rechtsgutachten in der frühen Neuzeit* (2006).
[2165] Motzki, "Religiöse Ratgebung" (1994), p. 15-16.
[2166] Similarly for religious authority, Krämer/ Schmidtke, *Speaking for Islam* (2007), p. 1-2.
[2167] See also Grimm, "Methode als Machtfaktor" (1987), p. 347.

in judicial activism, i.e. violating the authoritative texts, or substituting them with legal reasoning that has no basis in text at all.

Joint shaping of the law also signifies a joint juridical risk distribution: If the interpretation of adjudicative law is opened up not only to the judge but also the jurisconsult, then they share the risks that are innate to interpreting law, erring in adjudication, especially if the truth can be known to God alone and jurists are left to apply sound methodology to the law, and can still not be sure to have made the true judicial decision.

Second, Islamic law is jurists' law[2168], or Gelehrtenrecht[2169]. From early on, Muslim rulers conceded central aspects of the development and control of the law to the scholars, and instead adopted the role of merely supervising the judicial system and its organs such as the judges. Islamic legal scholar thus became indispensable to the legal and judicial system, and ruling, political authorities in fact often followed their advice on both questions of the law as well as on questions of the judiciary, such as their appointment and removal.

This explains my key results from Chapter Three: Judges and jurisconsults were for the most part left to themselves to arrange their relationship of authority. Judicial consultation was one way to debate their authority. Unlike the normative ideal of the judge reaching out to the jurisconsult to seek support (including the limitations) in adjudication, the empirical cases show more often that the jurisconsults, often in the plural, imposed their legal opinions on the judges. They could not coerce the judge to follow their opinions, and so instead they employed means leading to a quasi-coercive authority that made judges acted the way jurisconsults wanted. With the quasi-coercive authority of the jurisconsult the judge labored under the threat of losing his position and thus often adapted to the jurisconsult's opinion to cope with this possibility. In this sense, the salary and prestige that came with the profession of the judge also made him vulnerable to the jurisconsult. The creation of authority was left to the legal personae to

[2168] Schacht, *An Introduction to Islamic Law* (1964), p. 5, 209.
[2169] Motzki, "Religiöse Ratgebung im Islam" (1994), p. 16.

sort out. Political authorities did not interfere to arrange the authoritative relationship between judge and jurisconsult. [2170]

While until now, it was generally assumed that there was no clearly delineated authority between judge and jurisconsult in the formative period of Islamic law, now we should think that jurisconsults were designed for and in fact exerted a variety of authoritative pressures on judges, and in effect on adjudication. Significantly, a heightened juristic consciousness of the uncertainties in law (*authority of Law*) encouraged, and in part made obligatory, consultations between judge and jurisconsult (*authorities in law*). Law claims legitimate authority[2171], and legal authorities claim legitimate authority.

Jurisconsults succeeded not only in bringing in their persuasive authority to adjudication, but also knew how to transform their persuasive power into a quasi-coercive power, appealing to the power of the state authorities, especially when it came to having a say in the making of the judiciary. Thus despite the fact that there was no formally delineated relationship of authority between judge and jurisconsults, the latter had authority in a variety of ways towards the judges, normatively and empirically, including organisationally depending on different constellations of uncertainties in law, economic, social and doctrinal hegemonies, or their respective positions as officials of the state or largely independent scholars.

This study follows the approach that more can be learned about authorities in Islamic law when we study authorities first as part of a legal system and secondly as part of an Islamic system. This approach yields results that allow legal scholars greater access to the legal heritage of Islam, and prepares the ground for a comparative context, allowing Islamic law to aptly take its place in world legal studies. [2172]

The work is, in the end, also a contribution to a debate about "the other" legal system: The findings about the jurisconsults' "Konsultativjustiz" also put in different light the (still circulating) ideas about "Kadi-Justiz", pejoratively used for an adjudication leading

[2170] This was different, for example, in the Roman Empire of Hadrian, where the political authority interfered to sort out questions of authority between judge and jurisconsult, see Chapter Two, IV.1.
[2171] For Raz, it is an essential feature of law that it claims legitimate authority, Raz, *The Authority of Law* (2009) p. 30.
[2172] Fadel, *Adjudication in the Mālikī Madhhab* (1995), p. 378.

to arbitrary results. This term also shaped perceptions of how authorities of legal systems shape our appreciation for these systems.

The lack of certainty in law and the fact that uncertainty is part and parcel of any legal system, opens the gate for the dangers often dismissively called a "Kadi-Justiz".[2173] For example, U.S. Supreme Court Justice Felix Frankfurter, in his dissent in Terminiello v. Chicago, addressed the limits on the Supreme Court's extent of inquiry and stated: "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi sitting under a tree dispensing justice according to considerations of individual expediency."[2174] The image is meant to suggest that, in the Islamic context, the law is arrived at in an unprincipled manner that reflects the whim of the *qāḍī* more than the demands of a rationally cohesive legal system. This depiction entered not only US-understandings of Islamic adjudication. Similarly, the President of the German Federal Administrative Court stated that because there is no certainty in law and because certainty cannot be attained, judges are not allowed to resort to arbitrariness. "[Uncertainty] allows no Kadi-Justice, allows no adjudication that leads to a random and arbitrary result.[2175] Much of this blameworthiness may be laid upon *Max Weber* who wrote that "Kadi-justice knows no rational rules of decision".[2176] *J. Makdisi* describes the resulting image of Islamic judiciary, diplomatically as "truly mistaken".[2177] *F. Ziadeh*, scholar of Islamic law and editor of Khaṣṣāf's *Adab al-qāḍī* work, reproaches judge Frankfurter that if he had read Khaṣṣāf instead of Weber, he would not have "fallen into this error."[2178]

[2173] President of the German Federal Administrative Court Eckertz-Höfer, "Vom guten Richter" (2009), p. 734. US-American Justice Frankfurter in Terminiello v. Chicago, 337 U.S. 1, at p. 11; 69 S.Ct. 894, 899 (1949).
[2174] Terminiello v. Chicago, 337 U.S. 1, at p. 11; 69 S.Ct. 894, 899 (1949). Similarly, eminent US-American legal scholar Pound dimissively said: "The oriental cadi administrating justice at the city gate by the light of nature tempered by the state of his digestion." Pound, "Decadence" (1905), p. 21.
[2175] Eckertz-Höfer, "Vom guten Richter" (2009), p. 734. "Diese fehlende und nicht herstellbare Determiniertheit erlaubt den Richtern indes keine Beliebigkeit. Sie erlaubt keine Kadi-Justiz, keine Rechtsprechung auf ein beliebiges, gewillkürtes Ergebnis hin." She then refers to the German Görgülü case as an example of Kadi-Justiz, of judges taking an evidently subjective, here racist, stance. Regrettably, Kadi-Justiz thus has become a generic term, and has migrated to describe law entirely divorced from text. The case in point went from the German lower family court to the European Court of Human Rights (EGMR No.74969/01, Urt. v. 26.2.2004, NJW 2004, 3397) and back to the German Federal Constitutional Court (BVerfGE 111, 307).
[2176] Weber, Wirtschaft und Gesellschaft (1980), p. 477.
[2177] Makdisi, "Legal Logic and Equity in Islamic Law" (1985), pp. 64, 63- 65.
[2178] Ziadeh, "Integrity" (1990), p. 80.

A look into Khaṣṣāf's and Shāfiʿī's work would have illustrated how conscious judges were about the complexities of the law and the juridical challenges in the face of gaps, ambiguities and conflicts of the law, and that they sought ways to share the burden and risk of dispensing justice. A complementary look into Islamic legal history would have demonstrated that the authorities of law acted as controlling instances over the application as sought fit to establish an economic and social order according to the school doctrines they saw fit. For this, the Islamic legal system made ample space for an extrajudicial authority that shaped an entire adjudicative system.

Islamic legal scholarship did not see the need for formal rules that determine authority. Instead, the authority for interpreting Islamic law rested on the shoulders of at least two individuals, judge and jurisconsult, as expressed through the concept of judicial consultation.[2179] The precise contours of the authority, however, were never definitely delineated, and thus resulted in a multi-layered understanding of authority that lay the seeds of continued controversy in juristic scholarship.[2180]

The *authority of Islamic Law* evolved in parallel with the making of *Muslim authorities in law.* The development of the authority of law conditioned the development of the authorities in law, and vice-versa. Both have in common that just like the *authority of Law* claims allegiance and obedience[2181], so do *authorities in law*. This understanding suggests that the role of judicial consultation and the relationship between judge and jurisconsult is linked to the understandings of a dynamic theory of law. As these authorities were barely defined vis-à-vis each other, judges and jurisconsults engaged in a struggle with each other (and with those outside the field of legal professions) to gain and sustain acceptance for their conception of the law's social whole and the law's internal organization.[2182]

[2179] On consensus, rather than judicial consultation, as the legal instrument for the need of joint interpretation of the law, see Berkey, *Popular Preaching and Religious Authority* (2001), especially p. 88, and Mottahedeh, *Loyalty and Leadership* (1980).
[2180] Berkey, *Popular Preaching and Religious Authority* (2001), p. 90.
[2181] Raz, *The Authority of Law* (2009), p. 3.
[2182] See the introduction by Terdiman of Bourdieu, "The Force of Law" (1987), p. 808 about legal professionals' role within the juridical field.

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Abbreviations

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Glossary

A. H.: After Hijra, Islamic calendar started with the *hijra* , emigration, of Prophet Muhammad with his community from Mecca to Medina in 622

Adab al-qāḍī: genre of advice literature by and for judges, code of conduct in questions of adjudication, including the social role of the judge.

Adab al-muftī: genre of advice literature for *muftīs* (jurisconsults), often by scholars, code of conduct in questions of issuing legal opinions (*fatwās*), including the social role of the jurisconsult.

'ahd: a royal decree of judicial appointment; see also *kitāb*.

ahl al-ḥadīth: the so-called traditionalists, those who held that the law must rest exclusively on the Qur'ān and Prophetic *ḥadīth*.

ahl al-ra'y: the so-called rationalists, those who held that the law may be derived through human reason as guided by social and worldly experience.

amīn al-ḥukm (pl. *umanā' al-ḥukm*): trustee of the court who was in charge of the safekeeping of records, of confidential information and documents, and of property and cash.

aṣḥāb (sing. *ṣāḥib*): associates, colleagues or students; scholars who study and debate with each other, or students of a master; followers of a leading jurist without having studied under him or even having known him in person.

asḥāb al-masā'il (sg. *ṣāḥib al-masā'il*): court examiners who investigated the character of witnesses.

barīd (or ṣāḥīb al-barīd): official (postal) information service transmitting information from the centre to the provinces and back.

C.E.: Common Era, conventionally used for Gregorian (Western or Christian) calendar, starting with the birth of Jesus Christ.

dīnār: a gold coin, equivalent to ten or twelve dirhams.

dirham: a silver coin; see dinar.

dīwān (al-qāḍī): the court register in which the scribe recorded minutes of court sessions, judgments and a variety of documents, such as contracts, pledges and acknowledgments; see also *maḥdar*, *sijill*.

faqīh (pl. *fuqahā'*): jurist, an expert in the law.

fatwā: a legal opinion issued by a *muftī* on point of law; although formally non-binding, judges adhered to *fatwās* routinely.

fiqh: Islamic jurisprudence

hudūd (sing. ḥadd): class of crimes defined as to content and penalty in Qur'ān and Sunna

ḥadīth: Prophetic traditions; reports of what the Prophet had said, done or tacitly approved; see also *sunan*, Sunna.

ḥajib: the "chamberlain" of the judge.

ḥakam (pl. *ḥukkām*): pre-Islamic arbiter whose decision, although non-binding, was usually accepted by the two parties.

ḥalaqā (or *ḥalqa*; pl. *ḥalaqāt*): scholarly or teaching, learning circle.

ijmā': consensus, or unanimous doctrine and opinion of the recognized authorities at any given time. The third of the sources of legal knowledge.

iftā': the act by a *muftī* of giving a *fatwā* (an opinion on a point of law).

ijtihād: a process of legal reasoning and hermeneutics through which the jurist-*mujtahid* derives or rationalizes law based on a study of the sources (Qur'ān and the Sunna); during the early period, the exercise of one's discretionary opinion (*ra'y*) on the basis of legal knowledge (*'ilm*). Its opposite is *taqlīd*.

Ikhtilāf (or khilāf): juristic disagreement among the authorities of law; the science of juristic disagreement (also *'ilm al-khilāf*).

'ilm: knowledge of precedent, consisting, in the early period, of sunan (q.v.), but later of the Quran and Prophetic Sunna.

imām: generally, prayer leader; in the doctrinal schools, the eponym or masterjurist who is presumed to have constructed the methodological foundations and the positive and theoretical principles of the *madhhab* (q.v.).

isnād: a chain of authorities, in *ḥadīth* studies, going back to the source of the *ḥadīth*.

Istiftā': the request of a *muftī* for a *fatwā*.

istiḥsān: juristic preference. in the early period, based upon practical considerations, and later, on a particularized textual *ratio legis*.

istislāḥ: legal reasoning dictated by considerations of public interest that are, in turn, grounded in universal legal principles.

jilwāz: court sheriff or bailiff.

kātib: court scribe.

khilāf: see *ikhtilāf*.

kitāb: generally, an epistle; juridically, a written instrument sent by one judge to another demanding the enforcement of a decision or a right; also, a letter of judicial appointment; see also *'ahd*.

madhhab: legal teaching or legal doctrine espoused by a jurist; school of law.

majlis al-qadā': the place where the activity of adjudication (*qadā')*, performed by the judge, takes place. By extension, it is any place where the judge sits to adjudicate cases.

maḥḍar (pl. *maḥādir*): records made by the court's scribe and signed by the judge, containing a summary of actions and claims adduced by litigating parties; also, records of statements made by court witnesses to the effect that a certain action, such as a sale or a pledge, had taken place; see also *dīwān*.

maẓālim: tribunals held by the ruler but usually presided over by *qāḍīs*.

miḥna: the trial or inquisition, pursued by the caliphs and rationalists between 218/833 and 234/848; it revolved around the issue of whether or not the Qur'ān was created.

muftī: jurisprudent who issues *fatwās*; see also *mujtahid*.

mujtahid: often interchangeable with *muftī*, one who is competent to reason from the revealed texts, fashion new rules or justify and rationalize preexistent law; see also *ijtihād*.

muqallid: a jurist or layman who follows a *mujtahid*.

mushāwara: consultation, particulary judicial consultation.

na'ib al-qāḍī: judge's deputy.

qāḍī: judge

qaḍā': judgeship, the entire range of the judge's judicial activities.

qāḍī al-quḍāṭ: chief justice, highest position in judicial organization.

qimaṭr: a bookcase in which court documents are preserved; a court register in which documents are recorded.

qiyās: deductive arguments, analogy.

ra'y: discretionary opinion or reasoning based on precedent or legal knowledge (*'ilm*) or, at
times, on subjective considerations.

ṣāḥib al-masā'il: see *asḥab al-masā'il*.

shāhid (pl. *shuhūd*): witness.

Sharī'a: Islamic law as based on authoritative texts (Qur'ān and Sunna).

sijill (pl. *sijillāt*): witnessed record of the contents of *maḥḍar*, together with the judge's decision on each case.

sunan (sg. sunna): exemplary conduct of both groups and individuals that, over time, became a model to be emulated and followed by others.

Sunna: the Prophet's conduct that had been established as a model for others to follow; this conduct may be expressed in the Prophet's own practices, his utterances or his tacit approval of events or pronouncements made in his presence; with the passage of time it became, after the Qur'ān, the second source of Islamic law.

taqlīd: acceptance of recognized authoritative opinion or doctrine, the opposite of *ijtihād*.

traditionalist: a proponent of the view that law must exclusively rest on the revealed sources.

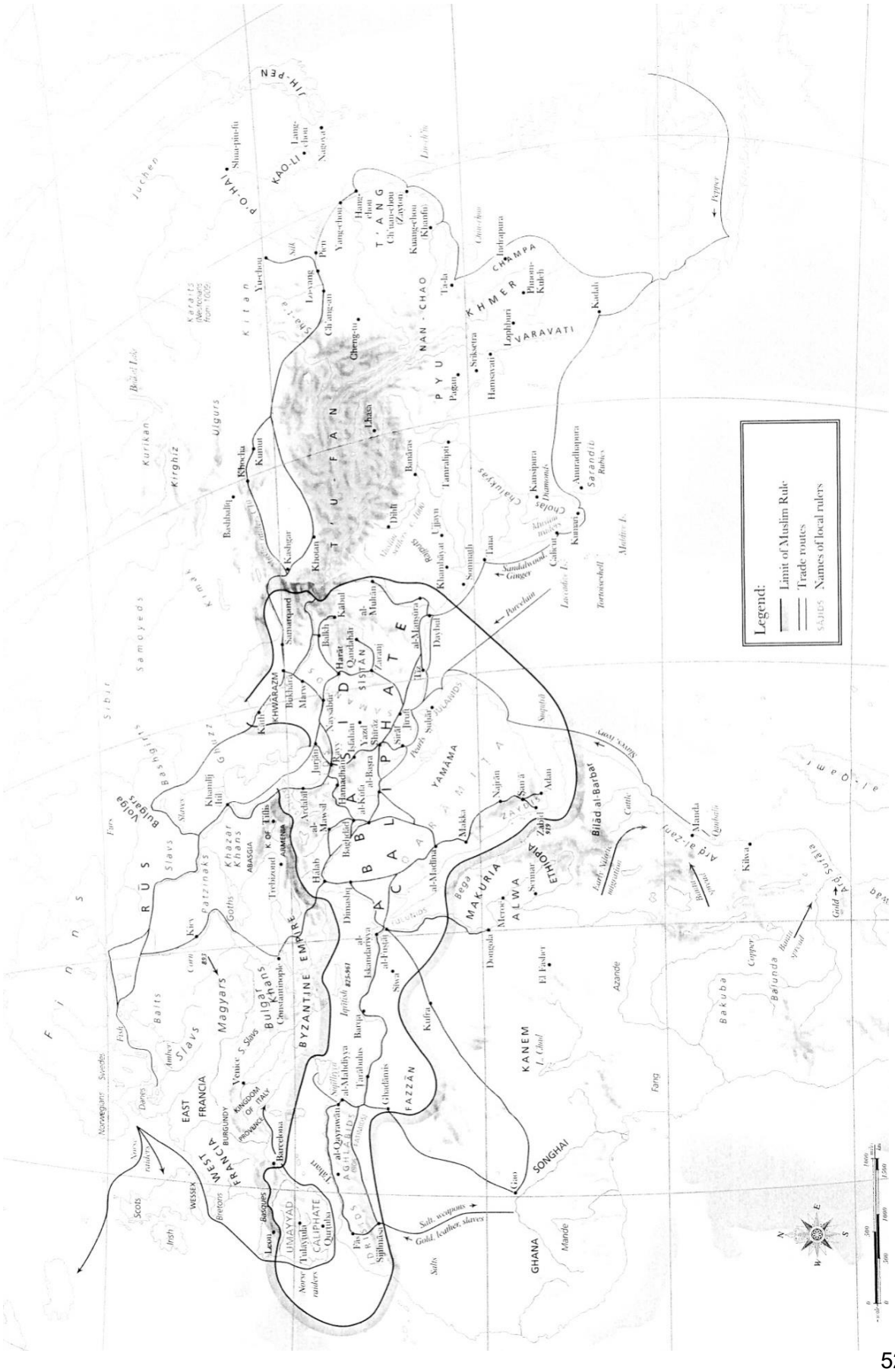
'ulamā' (sing. *ʿālim*): religious-legal scholars.

umma: the Muslim community.

uṣūl al-fiqh: legal theory that laid down the sources and principles of linguistic–legal interpretation: Qur'ān, Sunna, consensus and juristic reasoning, among others.

waqf (pl. *awqāf*): a perpetual charitable trust or endowment for the benefit of family members or the public at large.

Map of Abassid Empire ca. 287 / 900



Source: Brice, William C., *An Historical Atlas of Islam* Maps, Brill, 2001, p. 20.